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Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act and the Move to Absolute Governmental Immunity in Foster Care Placement and Supervision

Austen L. Parrish

Indiana University Maurer School of Law, austparr@indiana.edu

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AVOIDING THE MISTAKES OF *TERRELL R.*: THE UNDOING OF THE CALIFORNIA TORT CLAIMS ACT AND THE MOVE TO ABSOLUTE GOVERNMENTAL IMMUNITY IN FOSTER CARE PLACEMENT AND SUPERVISION

Austen L. Parrish*

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* Instructor of Legal Writing, Southwestern University School of Law. J.D., Columbia University, 1997; B.A., University of Washington, 1994. The author is grateful to his wife, Leslie Parrish, as well as Debra Back, Joan Catherine Bohl, Janie Chuang, James A. Kushner, Ashley C. Parrish, and Dennis T. Yokoyama for their thoughtful comments on an earlier draft. The author would also like to thank the Board of Trustees of Southwestern University School of Law and Dean Leigh H. Taylor for their support and encouragement. Finally, the author thanks his research assistants, Tamara Fong and Andrew Hayden.

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INTRODUCTION

“Beaten,” “bruised,” “tortured,” “molested,” “sexually violated,” “burned,” “killed”: all words ripped from horrific headlines when foster parents abuse the children they were meant to protect.¹ The perils facing California’s foster children are particularly acute.² According to the State’s own data, a foster-care

¹ See, e.g., David Crary, *Foster Parents Discouraged by Deluge of Bad Publicity*, L.A. TIMES, June 22, 2003, at A22, available at 2003 WL 2414859 (discussing media coverage of children abused in foster care); Jim Davis & Michael Baker, *Lawsuit Alleges Abuse of Children*, FRESNO BEE, Mar. 11, 2003, at A1 (describing horrific abuse allegations, including: foster parents starved, beat, tortured, and emotionally abused a four-year-old boy; foster parents bound a child with duct tape and burned and scarred him; and foster parents choked a seven-year-old foster child, tied him up with rope, and hung him on a bathroom hook, with duct tape covering his eyes and face); Matthew Franck, *Deaths Are Driving Lawmakers to Change Foster Care*, ST. LOUIS POST-DISPATCH, Feb. 2, 2003, at B1, available at 2003 WL 3553150 (describing three-year-old foster child found chained to a bed); Timothy Roche, *The Crisis of Foster Care*, TIME, Nov. 13, 2000, at 74, available at 2000 WL 28889353 (discussing foster care abuse cases, including allegations that a foster grandmother battered and tortured a six-year-old boy; the foster child was tied with panty hose and belts to a banister); *State Agency Cited Hospital Where Foster Child Died*, ST. LOUIS POST-DISPATCH, Mar. 24, 2003, at B4, available at 2003 WL 3565392 (describing death of two-year-old foster child from foster parents’ violent shaking).

² See, e.g., Troy Anderson, *Child Advocates Blast Ruling: County Held Blameless in Foster-Care Case*, L.A. DAILY NEWS, Nov. 12, 2002, at N4 (reporting foster parent’s sexual abuse of a fourteen-year-old foster child); Troy Anderson, *Voodoo Foster Care Suit May End in Settlement*, L.A. DAILY NEWS, July 22, 2003, at N3, available at 2003 WL 5681474 (describing six foster care children who were physically abused, sexually abused, severely neglected, and exposed to voodoo rituals in an insect-infested foster home); Davis & Baker, *supra* note 1, at A1 (describing horrific abuse allegations); Richard Fausset, *Charges Filed in Deaths of Two Boys Left in Car*, L.A. TIMES, July 29, 2003, at B4, available at 2003 WL 2423796 (describing foster mother who left two foster sons in a car for five hours, where the sons died of heat exposure); Charlie Goodyear, *Contra Costa to Pay \$500,000 in Molest Case*, S.F. CHRON., July 29, 2003, at A13, available at 2003 WL 3759249 (describing foster son who was molested and forced to share his foster father’s bed); Jennifer Sinco Kelleher,

child is almost twice as likely to be maltreated in California than elsewhere.³ "California's foster care system is rated among the most dangerous to children in the nation."⁴ These statistics are troubling because California has the largest child welfare services system in the country: twenty percent of all children nationwide in foster care—almost 100,000—are in California.⁵

Historically, the failings of the California foster care system were often blamed on budget constraints, inadequate staffing, or poor legislation.⁶ But given that the California Legislature, in conjunction with child advocacy groups, has passed numerous legislative reforms⁷ and has spent billions of dollars yearly on foster care,⁸ commentators increasingly attribute the

County Agrees to More Foster Care Visits, L.A. TIMES, May 27, 2002, at B1, available at 2002 WL 2478728 (describing abusive foster mother who would "dunk" her child's head in the toilet when he asked for a drink of water); Greg Krikorian, *Lawyers for Children Say County Fails to Cooperate*, L.A. TIMES, Aug. 27, 2001, at B1 (describing infant permanently brain-damaged from injuries inflicted by foster parents); *A Share of Pain and Tears*, PRESS-ENTERPRISE (Riverside, Cal.), Jan. 2, 2001, at B01 (describing twenty-three-month-old foster child who was beaten and starved to death).

³ U.S. DEP'T OF HEALTH & HUMAN SERVS., FINAL REPORT: CALIFORNIA CHILD AND FAMILY SERVICES REVIEW 2 (2003) [hereinafter FINAL REPORT] (observing that the rate of incidence of maltreatment of children in California foster care for fiscal year 2002, as reported in the state data profile, was 1.06% and did not meet the national standard of 0.57% or less).

⁴ Letter from Amici Curiae National Association of Counsel for Children and the Children's Advocacy Institute in Support of Real Party in Interest's Petition for Review in *County of Los Angeles v. Superior Court* to Chief Justice Ronald M. George and the Associate Justices of the California Supreme Court 12 (Nov. 5, 2002) (on file with California Supreme Court and author); see also U.S. DEP'T OF HEALTH & HUMAN SERVS., AUDIT OF PROTECTIONS PROVIDED TO FOSTER CARE CHILDREN THROUGH THE JUVENILE JUSTICE SYSTEM IN CALIFORNIA (2000) [hereinafter 2000 AUDIT OF PROTECTIONS] (finding "significant problems" in the California foster care system).

⁵ LISA K. FOSTER, FOSTER CARE FUNDAMENTALS: AN OVERVIEW OF CALIFORNIA'S FOSTER CARE SYSTEM 10 (2001) ("California has the largest child welfare services system in the country: one in five of all child welfare children nationwide are in the California system."); DIANE F. REED & KATE KARPILOW, UNDERSTANDING THE CHILD WELFARE SYSTEM IN CALIFORNIA: A PRIMER FOR SERVICE PROVIDERS AND POLICY MAKERS 17 (2002) (indicating that as of April 2002, over 91,000 children were in the California foster care system).

⁶ Douglas J. Besharov, *Protecting Children from Abuse: Should It Be a Legal Duty?*, 11 U. DAYTON L. REV. 509, 510-11 (1986) (noting that "until recently, [stories of abuse] were seen as evidence of inadequate staffing and poor administrative procedures"); see also REED & KARPILOW, *supra* note 5, at 25 (describing a "severe shortage of social workers" and caseloads at "twice the recommended levels"). But cf. Troy Anderson, *Foster Care in Crisis*, L.A. DAILY NEWS, Dec. 28, 2003, at N1 (quoting social worker who says that social workers "used to have 80 to 100 cases" but now have approximately thirty).

⁷ LITTLE HOOVER COMM'N, STILL IN OUR HANDS: A REVIEW OF EFFORTS TO REFORM FOSTER CARE IN CALIFORNIA 7 (2003) (explaining that the California legislature and governor have considered, since 1999, over one hundred bills and enacted more than forty pieces of legislation intended to address deficiencies in the child welfare system).

⁸ FOSTER, *supra* note 5, at 31 ("It costs federal, state, and county government over \$1.5 billion for foster care administration and payments each year. An additional \$500 million annually goes to child welfare services for children in foster care and their families each year. Billions are also spent through other systems for health and mental health care, special education, court administration, substance abuse treatment and other services used by foster

deficiencies of the system, at least in part, to the failure of child service agencies and caseworkers to follow the California Legislature's mandate.⁹ While systemic reasons may exist for these failings,¹⁰ the perception that social workers, at times, are "not doing their jobs" raises an important question. When should a government be liable for a social worker's negligent placement or supervision of a child in foster care?

The answer to this question was, at one time, settled. Under the California Tort Claims Act,¹¹ a government could be held liable in two ways: directly and

children."); LITTLE HOOVER COMM'N, *supra* note 7, at 2 (noting that the 2002-03 budget for foster care services was \$2.2 billion); *see also* CAL. DEP'T OF SOC. SERVS., PROGRAM ALLOCATION AND EXPENDITURES REPORT FROM FISCAL YEAR 2001/2002 6 (2002) (listing Child Welfare Services allocation and expenditures by county); ESTIMATES BRANCH, CAL. DEP'T OF SOC. SERVS., ESTIMATES ALLOCATION TABLE 2002-2003, GOVERNOR'S BUDGET, MAY 2003 REVISE (released Aug. 2003). For a discussion of the costs of operating the child welfare system on the national level, see Mark E. Courtney, *The Costs of Child Protection in the Context of Welfare Reform*, FUTURE OF CHILDREN, Spring 1998, at 88 (1998).

⁹ 2000 AUDIT OF PROTECTIONS, *supra* note 4, at 7; *see also* Troy Anderson, *500 Foster Kids Missing*, L.A. DAILY NEWS, Oct. 10, 2002, at N13 (reporting that Department of Children and Family Services is unable to locate approximately five hundred foster children in its custody); Anderson, *supra* note 6 (describing a foster care crisis where social workers are "overlooking the warning signs of many children in the community in real danger and are not able to properly ensure the safety of children in foster care"); Carla Rivera, *State Moves to Shut Down Foster Family Agency*, L.A. TIMES, Feb. 1, 2003, at B3 (reporting that state authorities moved to revoke the license of an agency alleged to have failed to ensure the health and safety of more than one hundred children under its supervision; claims included that the agency allowed unqualified staff members to evaluate potential foster families, failed to properly perform criminal background checks, and failed to report sexual abuse in timely fashion); Cheryl Romo, *Everyone Seemed to Know Breanna and Joan Were in Danger, Except Those Charged with Guarding Them*, L.A. DAILY J., Jan. 5, 2001, at 1 (reporting the deaths of two foster children and the failings of the system); *cf.* LITTLE HOOVER COMM'N, *supra* note 7, at 8-11 (noting lack of supervision and leadership is root cause of "dysfunctional" foster care system).

¹⁰ Commentators generally believe that social workers are overburdened with large caseloads because of underfunding. REED & KARPILOW, *supra* note 5, at 25; *see also* CAL. DEP'T OF SOC. SERVS., SB 2030 CHILD WELFARE SERVICES WORKLOAD STUDY: FINAL REPORT 143-60 (2000) (discussing findings on worker caseload and outlining recommendations). Although progress has been made in recent years and caseloads are diminishing, underfunding is sometimes offered as an explanation or justification for a social worker's negligence. *Id.* But the issue of governmental liability is separate and distinct from the issue of whether underfunding historically has caused the foster care system to fail. *See* Salameda v. INS, 70 F.3d 447, 452 (7th Cir. 1995) (stating that "understaffing is not a defense" to an agency's violation of a law); Scott v. County of Los Angeles, 32 Cal. Rptr. 2d 643, 654 (Ct. App. 1994) ("Financial limitations of governments have never been, and cannot be, deemed an excuse for a public employee's failure to comply with mandatory duties imposed by law."); *cf.* Robbins v. Superior Court, 695 P.2d 695, 707 (Cal. 1985) ("This court is not unmindful of the budgetary constraints facing counties. Nonetheless, financial considerations cannot justify an infringement of a basic constitutional right . . ."). *See generally* Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 63 (1997) (analyzing the issue of agency resource constraints and the need for agencies to adhere to administrative law).

¹¹ CAL. GOV'T CODE §§ 810-996.6 (West 1995 & Supp. 2004).

derivatively. Direct liability, on the one hand, existed when a social worker or social service agency failed to follow the state statutes and regulations concerning foster care placement.¹² In those situations, the government was negligent per se, and if that negligence proximately caused the child's injuries, the foster child would recover. Derivative liability, on the other hand, existed when a social worker was negligent in supervising a foster child's placement, and the child was harmed as a result of that negligence.¹³ Social workers were generally not entitled to governmental immunity because immunity extended only to basic policy decisions, and foster child care and supervision was not considered a policy decision.¹⁴ But in recent years, the California courts have retreated from this settled law.

In 2002, the Second District Court of Appeal in *Los Angeles County v. Superior Court (In re Terrell R.)*—in a radical departure from prior law—interpreted the California Tort Claims Act, along with the statutory provisions governing foster care placement, so narrowly that governmental immunity would now appear inevitable in any case alleging foster child mistreatment.¹⁵ The court reached its decision after concluding that the statutory provisions governing foster care placement were not intended to protect children from abuse.¹⁶ The court further held that a social worker not only has discretion to determine where to place a dependent child, but also has discretion to ignore statutorily mandated procedures in making that decision.¹⁷ The reasoning of that case, if followed, in conjunction with the federal courts' traditional unwillingness to entertain claims under the federal civil rights laws,¹⁸ would

¹² *Id.* § 815.6 (West 1995); see generally *Johnson v. State*, 447 P.2d 352, 359-63 (Cal. 1968) (finding state liable for parole officer's failure to warn of foster child's violent tendencies).

¹³ CAL. GOV'T CODE § 820.2; see, e.g., *Elton v. County of Orange*, 84 Cal. Rptr. 27, 30 (Ct. App. 1970).

¹⁴ *Elton*, 84 Cal. Rptr. at 30; see also *Nunn v. State*, 677 P.2d 846, 849-50 (Cal. 1984) (en banc); *Johnson*, 447 P.2d at 360.

¹⁵ *County of Los Angeles v. Superior Court (Terrell R.)*, 125 Cal. Rptr. 2d 637 (Ct. App. 2002), *reh'g denied*, 2002 Cal. App. LEXIS 4872 (Ct. App. Oct. 18, 2002), *rev. denied*, 2002 Cal. LEXIS 8629 (Dec. 18, 2002).

¹⁶ *Id.* at 645-47.

¹⁷ *Id.*

¹⁸ See, e.g., *Babcock v. Tyler*, 884 F.2d 497, 503-04 (9th Cir. 1989), *overruling recognized by Miller v. Gammie*, 335 F.3d 889, 896-900 (9th Cir. 2003). Prior to July 2003, the Ninth Circuit provided absolute immunity for state social workers involved in child welfare proceedings. Federal relief may be available now that the Ninth Circuit no longer confers absolute immunity on social worker placement and supervision decisions. But even still, a § 1983 claim—requiring proof that the social worker was recklessly indifferent to well-established law—will provide an abused foster child relief in only the most egregious of cases. See generally Daniel J. Skoler, *A Constitutional Right to Safe Foster Care?—Time for the Supreme Court to Pay Its I.O.U.*, 18 PEPP. L. REV. 353, 367 (1991) (describing the consequences of *Babcock*); Christine M. Dine, Comment, *Protecting Those Who Cannot Protect Themselves: State Liability for Violation of Foster Children's Right to Safety*, 38 CAL. W. L. REV. 507, 509-10 (2002) (reviewing liability issues for foster care child abuse under federal law).

mean that children abused or neglected in the California foster care system would face formidable—if not insurmountable—barriers to obtaining legal redress for their injuries.

The *Terrell R.* case has enormous practical significance. Although numerous lawsuits are brought, very few foster care intentional abuse cases result in published opinions. In the last thirty years, only a handful of California decisions have directly addressed the governmental liability issue in the context of negligent foster care placement and supervision.¹⁹ Because of the dearth of decisions, every published decision takes on unusual significance. Anecdotal evidence suggests that based on the reasoning of *Terrell R.*, private practitioners are more unwilling than ever to serve as attorneys for foster children when the suit involves a claim of foster parent abuse, because the chances of succeeding on such claims are perceived as remote.²⁰ Government attorneys, on the other hand, now routinely bring demurrers asserting that they owe no duties, mandatory or otherwise, to foster children. The *Terrell R.* decision was so significant that, less than a year after it was decided, legislation was proposed and then passed to specifically address it.²¹ Although this recent legislation now purports to limit the impact of *Terrell R.*, it does not explain how the *Terrell R.* court erred.²² Nor does the recent legislation indicate how a court can, in the future, avoid the mistakes the *Terrell R.* court made.²³ This Article addresses these issues.

This Article examines the status of governmental liability under the California Tort Claims Act for a social worker's negligent placement or negligent supervision of a foster child and explains why *Terrell R.* was wrongly decided. Part I describes the California foster care system and the significant challenges it faces, which make the governmental liability issue an important one. Part II examines the California Tort Claims Act, describes when a

¹⁹ See, e.g., *Becerra v. County of Santa Cruz*, 81 Cal. Rptr. 2d 165 (Ct. App. 1998); *Scott v. County of Los Angeles*, 32 Cal. Rptr. 2d 643 (Ct. App. 1994); *Elton*, 84 Cal. Rptr. at 27.

²⁰ No studies or statistics are available. Conversations, in August 2003, with individuals at the Los Angeles County Bar Association, the Los Angeles County Dependency Court, and child advocacy groups, as well as with private practitioners, suggest that *Terrell R.* has made it extremely difficult for injured foster children to obtain recourse from counties.

²¹ As a result of the *Terrell R.* case, child advocate groups immediately proposed legislation to minimize the effect of that decision's holding. A version of that legislation was recently passed. CAL. WELF. & INST. CODE § 16000.1 (West Supp. 2004) (entitled "[l]egislative findings and declarations; intent; duty to care for and protect children in foster care"); see also *Duty to Foster Children Reaffirmation Act*, ch. 847, 2003 Cal. Stat.; A.B. 1151, 2003-04 Gen. Assem., Reg. Sess. (Cal. 2003); *Foster Care: Hearing on A.B. 1151 Before the Assem. Comm. on the Judiciary*, 2003-04 Gen. Assem. (Cal. 2002) (synopsis of bill).

²² CAL. WELF. & INST. CODE § 16000.1(a)(3)-(b)(1) (explaining that "nothing in this section is intended to increase or decrease the liability of the state as it existed prior to the [*Terrell R.* case] . . . It is the intent of the Legislature that nothing in the decision of the California Court of Appeal in [*Terrell R.*] shall be held to change the standards of liability and immunity for injuries to children in protective custody that existed prior to that decision."); see also *Duty to Foster Children Reaffirmation Act*; Cal. A.B. 1151.

²³ See CAL. WELF. & INST. CODE § 16000.1.

governmental entity may face liability, and discusses the competing policies at play in determining governmental liability questions. Part III analyzes the history of governmental liability and immunity in the foster care context, leading up to the recent decision in *Terrell R.* Part III argues that *Terrell R.* misapplied the California Tort Claims Act, misconstrued the child welfare statutes, and ignored binding precedent to effectively provide governmental actors absolute immunity in foster care placement and supervision. Specifically, the *Terrell R.* court reached that result by confusing and conflating two separate statutory bases for liability. The Article then explains how this move to absolute immunity, whether done intentionally or unintentionally, not only contradicts sound public policy, but is a result long rejected by the California Legislature and the California Supreme Court. Finally, in Part IV, this Article explores how a typical negligent placement or negligent supervision claim should be resolved. The Article explains why immunity is generally inappropriate in cases where the foster child is intentionally abused by the foster parents. The Article concludes that the courts must uphold the state of the law before *Terrell R.*, as set forth by the landmark California Supreme Court case *Johnson v. State of California*.²⁴ If a social worker negligently places or negligently supervises a child in foster care, and the child is then physically or sexually abused as a result of that negligence, liability is the rule, not the exception.

I. AN OVERVIEW: CALIFORNIA'S FOSTER CARE SYSTEM

The issue of governmental liability is significant in the foster care context because all too often foster children are harmed by their foster parents. Although the purpose of foster care is to protect children from abuse, the system has often failed to achieve that goal, and is commonly described as being "in crisis." Understanding both the purpose of the California foster care system and its current crisis is thus essential to understanding the governmental liability issues discussed in this Article.

A. *Temporary Child Protection as a Primary Purpose of Foster Care*

Foster care exists to protect children when their parents can no longer properly care for them. Parents have a liberty interest in the care, custody, and raising of their children.²⁵ But in cases of child abuse, neglect, or abandonment,

²⁴ *Johnson v. State*, 447 P.2d 352, 359-63 (Cal. 1968).

²⁵ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981); see also *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) ("[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 846 (1977) (explaining that the Fourteenth Amendment gives biological parents a "constitutionally recognized liberty

a state has a compelling interest—if not a duty—to intervene.²⁶ A state has the authority to protect children from abuse²⁷ under the doctrine of *parens patriae*.²⁸ When the government determines that a child is living in an abusive home environment, the child may be removed and placed in the foster care system.²⁹

In California, as elsewhere, the foster care system is intended to provide a temporary home-like setting to protect children who should not live with their parents because of abuse, neglect or abandonment.³⁰ To this end, the dependency laws embody three goals: “(1) to protect the child; (2) to preserve the family and safeguard the parents’ fundamental right to raise their child, as long as these can be accomplished with safety to the child; and (3) to provide a stable, permanent home for the child in a timely manner.”³¹ The foster care

interest” in the custody of their children “that derives from blood relationship, state law sanction, and basic human right”); *In re Lucero L.*, 998 P.2d 1019, 1032 (Cal. 2000) (finding that a parent’s desire for and right to “the companionship, care, custody and management of his or her children” is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection (quoting *Santosky*, 455 U.S. at 758-59)); *In re Sade C.*, 920 P.2d 716, 737 (Cal. 1996) (explaining that parents have a fundamental liberty interest in the care and custody of their children).

²⁶ See generally Besharov, *supra* note 6; cf. *Deshaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195-98 (1989) (holding that no legal duty exists for a state to protect a child not in its custody from parental abuse, but suggesting a duty might exist when the state takes a child into its custody).

²⁷ *Prince v. Massachusetts*, 321 U.S. 158, 165-67 (1944); see generally Besharov, *supra* note 6, at 509-40 (describing liability against caseworkers for failure to protect children as arising from three sources—tort negligence, statutory mandate, and federal civil rights law); Richard J. Gelles & Ira Schwartz, *Children and the Child Welfare System*, 2 U. PA. J. CONST. L. 95, 96-97 (1999); Kristen L. Davenport, Note, *Due Process—Claims of Abused Children Against State Protective Agencies—The State’s Responsibility After Deshaney v. Winnebago County Department of Social Services*, 19 FLA. ST. U. L. REV. 243, 246-47 (1991).

²⁸ *Parens patriae*, which means “parent of the country,” is defined as the government’s power and responsibility to protect and care for those citizens who cannot take care of themselves, such as infants. See generally Natalie Loder-Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children’s Welfare*, 6 MICH. J. GENDER & L. 381 (2000).

²⁹ See *Santosky*, 455 U.S. at 767 (interpreting state social services law and finding state’s interest in finding a child a new home arises only “when it is clear that the natural parent cannot or will not provide a normal family home for the child”) (quoting N.Y. SOC. SERV. LAW § 384-b.1.(a)(iv) (McKinney Supp. 1981-1982)); *Stanley v. Illinois*, 405 U.S. 645, 649 (1972); *In re Sade C.*, 920 P.2d at 737; see also *In re Marilyn H.*, 851 P.2d 826, 833 (Cal. 1993) (“Although a parent’s interest in the care, custody and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling state interest, the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect.”) (internal citations omitted). In addition to being placed in foster family homes or with foster family agencies, children may be placed in: (1) emergency public shelters; (2) homes of relatives; or (3) group homes or residential treatment centers. FOSTER, *supra* note 5, at 20-24.

³⁰ CAL. FAM. CODE § 7950 (West Supp. 2004).

³¹ *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 727 (Ct. App. 2001) (discussing the three primary goals of the dependency system and citing to the relevant statutes). Child protection is a key

system thus "removes the child from the natural home situation while deficiencies are being corrected or arrangements are made for a change in parental responsibility."³² Once placed in foster care, the foster parents provide day-to-day care, but the child welfare agency retains general power over a child's life and "in effect, supervises the foster parents."³³

This degree of supervision is significant because of the California foster care system's size. Almost 90,000 children—approximately one out of every hundred—are in foster care.³⁴ California is one of eleven states operating on a state-supervised, but county-administered, model of governance.³⁵ Fifty-eight county welfare departments administer the system under the authority of the California Department of Social Services.³⁶ The 2002-2003 budget for foster care services in California exceeded \$2.2 billion.³⁷

B. *A System In Crisis*

Despite the foster care system's goals, the system has often failed to protect children from abuse. The system is in crisis. Known as a "broken" and "costly" system,³⁸ "it is the overwhelming consensus of policymakers, child welfare administrators, service providers, parents, and current and former foster youth" that the foster care system needs "to be fixed."³⁹

As an initial matter, foster care is often not the intended sanctuary from abuse. On a national level, the statistics paint a troubling picture. The "rates of abuse and neglect of children in foster care may be greater than those in the general population."⁴⁰ In some extreme cases, a child may be at greater risk of

goal of the dependency laws. See, e.g., CAL. WELF. & INST. CODE §§ 202, 300.2, 361(c)(1), 361.2(a), 361.3(a)(8), 366.21(e), 16000.

³² Skoler, *supra* note 18, at 356; see also FOSTER, *supra* note 5, at 7 (arguing that the purpose of the foster care system is thus to "keep children safe while child welfare services are provided so they can be reunited with their families").

³³ Skoler, *supra* note 18, at 358.

³⁴ FOSTER, *supra* note 5, at 7; see also REED & KARPILOW, *supra* note 5, at 16-17 (finding that 91,951 children were in supervised foster care in California as of April 2002); Child Welfare Research Ctr., Child Welfare Supervised Foster Care Highlights from CWS/CMS, at 1, available at <http://cssr.berkeley.edu/cwscmsreports/Pointintime/fostercare/childwel/arcAgeEthnic.asp> (Jan. 2003) (noting that as of January 1, 2003, 89,210 children were in child-welfare supervised foster care).

³⁵ REED & KARPILOW, *supra* note 5, at 5.

³⁶ 2000 AUDIT OF PROTECTIONS, *supra* note 4, at i; REED & KARPILOW, *supra* note 5, at 5.

³⁷ Letter from the Little Hoover Commission to Governor Gray Davis and Members of the California Legislature 2 (Feb. 4, 2003) (on file with author); see also *supra* note 8.

³⁸ LITTLE HOOVER COMM'N, *supra* note 7, at 2.

³⁹ FOSTER, *supra* note 5, at 8; see also Letter from the Little Hoover Commission to Governor Gray Davis and Members of the California Legislature, *supra* note 37, at 1 ("[T]he foster care system fumbles forward, and often backward, and costs children and families their happiness, their prosperity and even their lives.").

⁴⁰ Timothy Arcaro, *Florida's Foster Care System Fails Its Children*, 25 NOVA L. REV. 641, 647 (2001) (citing Roger J.R. Levesque, *The Failures of Foster Care Reform*:

harm once they enter foster care than they would be if they remained with their abusive parents.⁴¹ In New York City, a study concluded that foster care children were one and one-half times more likely to suffer abuse and neglect than children in the general population.⁴² Likewise, a Baltimore study of 149 cases, based on the social service agency's own records, found that 28% of the children had been abused while in foster care.⁴³ One commentator, after studying foster care nationally, concluded that "43% of [the foster children] had been placed in an unsuitable foster home, and that 57% . . . were at serious risk of harm"⁴⁴

Statistics for the number of abused or neglected⁴⁵ children in the California foster care system, however, are substantially higher than national foster care averages.⁴⁶ According to a report released in January 2003 by the United States Department of Health and Human Services, the incidence of child maltreatment

Revolutionizing the Most Radical Blueprint, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 7 (1994); Skoler, *supra* note 18, at 356); see also Kay P. Kindred, *Of Child Welfare Reform: The Implications for Children When Contradictory Policies Collide*, 9 WM. & MARY J. WOMEN & L. 413, 461-63 (2003) (discussing study by the National Foster Care Education Project showing that "children in foster care are at a much greater risk of maltreatment than are children in the population at large").

⁴¹ Arcaro, *supra* note 40, at 647 ("The latest national data on child abuse fatalities suggest that a child is nearly three times more likely to die of abuse in foster care than in the general population."); Timothy J. Courville, Note, *Governmental Liability for Failure to Prevent Child Abuse: A Rationale for Absolute Immunity*, 27 B.C. L. REV. 949, 984 (1986) ("Because of the many problems associated with foster care, some clinicians have concluded that placing a child in a foster home is often more harmful to a child than the original home situation may have been.") (citing Douglas J. Besharov, *Child Protection: Past Progress, Present Problems, and Future Direction*, 17 FAM. L.Q. 151, 154 (1983)); Letter from the Little Hoover Commission to Governor Gray Davis and Members of the California Legislature, *supra* note 37, at 2 (noting that in California, "in some extreme but intolerable cases, the level of care [in the foster care system] is no better than the abusive homes from which those children were rescued"); see also CAL. DEP'T OF SOC. SERVS., REPORT TO THE LEGISLATURE ON INVESTIGATION OF COMPLAINTS AGAINST CERTIFIED FAMILY HOMES AND FOSTER FAMILY AGENCIES 16-19, 32 (2001) (detailing the complaints of physical abuse, sexual abuse, and neglect, among other things, against certified family homes between January 1, 2000 and December 31, 2000). But see Gelles & Schwartz, *supra* note 27, at 107 (explaining that some research shows that "children who reside in foster care fare neither better nor worse than children who remain in homes in which maltreatment occurred").

⁴² Dine, *supra* note 18, at 509-10.

⁴³ *Id.* at 510 (citing BRENDA SCOTT, OUT OF CONTROL: WHO'S WATCHING OUR CHILD PROTECTION AGENCIES 112 (1994)).

⁴⁴ Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 207 (1998).

⁴⁵ Child abuse and neglect are defined by section 11165.1 of the California Penal Code and section 300 of the California Welfare and Institutions Code. In California, abuse includes physical abuse, sexual abuse, emotional abuse, general neglect, severe neglect, and exploitation, including sexual exploitation. CAL. PENAL CODE § 11165.1 (West Supp. 2004); CAL. WELF. & INST. CODE § 300 (West Supp. 2004); see also REED & KARPILOW, *supra* note 5, at 9.

⁴⁶ FINAL REPORT, *supra* note 3, at 21.

in California foster care is almost twice the national average.⁴⁷ The rate of recurrence for substantiated child maltreatment within six months was also 57% greater in California than nationally.⁴⁸ In July 2003, the Director of the Los Angeles County Department of Children and Family Services conceded that children in the Los Angeles County foster care system were abused or neglected in almost 16% of the certified foster homes: a rate higher than almost anywhere in the nation.⁴⁹ One recent study concluded that a child is “up to ten times more likely to die from abuse or neglect” in Los Angeles County foster care than in any other place in the nation.⁵⁰

Not only does the foster care system fail to provide safe sanctuary, it is also not, as intended, a temporary home.⁵¹ Too often the stay is permanent. By statute, children ought to remain in foster care for no longer than a year,⁵² but

⁴⁷ *Id.* at 2 (noting that the incidence of maltreatment of children in foster care for the fiscal year 2000, as reported in the state data profile, was 1.06% as compared to a national standard of 0.57% or less); see also U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD WELFARE OUTCOMES 2000: ANNUAL REPORT TO CONGRESS (2000).

⁴⁸ FINAL REPORT, *supra* note 3, at 2 (observing that the recurrence rate for substantiated child maltreatment within six months for the fiscal year 2000 was 10.7%, compared to a national standard of 6.1%).

⁴⁹ Troy Anderson, *L.A. Foster Abuse Rate High*, L.A. DAILY NEWS, July 23, 2003, at N3; see also Troy Anderson, *New Foster Chief Unveils Strategy*, L.A. DAILY NEWS, Mar. 26, 2003, at N3 [hereinafter *New Foster Chief Unveils Strategy*] (quoting David Sanders, director of the Los Angeles County Department of Child and Family Services, who stated that “the number of kids that appear to get hurt after the department gets involved in their lives is way too high”); Troy Anderson, *Public Hearings Sought on Foster Care System*, L.A. DAILY NEWS, Jan. 14, 2004, at N5 (noting prior *Daily News* estimates that up to half of the 75,000 children in the Los Angeles County child protective system and adoptive homes were needlessly placed in a system that is often more dangerous than their own homes).

⁵⁰ Anderson, *supra* note 9; see also Troy Anderson, *Foster Care Cash Cow*, L.A. DAILY NEWS, Dec. 7, 2003, at N1 (citing government statistics showing that the “hundreds of thousands of children who have cycled through the county’s system over the years are six to seven times more likely to be mistreated and three times more likely to be killed than children in the general population,” and noting that over 660 children have died in the Los Angeles County foster care system since 1991); Cheryl Romo, *L.A. Ranks First by Far in Foster-Care Abuse*, L.A. DAILY J., Aug. 7, 2002, at A1 (discussing that rates of abuse in Los Angeles County are significantly higher than national rates).

⁵¹ The “average stay in foster care has risen over the past fifteen years with many children spending more than two years in care on a national level” Arcaro, *supra* note 40, at 647; see also *New Foster Chief Unveils Strategy*, *supra* note 49 (quoting director of Los Angeles County Department of Child and Family Services stating that “kids are in foster care for too long”). See generally LITTLE HOOVER COMM’N, *supra* note 7, at 2; Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637 (1999).

⁵² Reunifications with family or permanency hearings are required to occur within twelve months of a child’s entry into foster care. CAL. WELF. & INST. CODE § 361.5 (West Supp. 2004); CAL. R. CT. 1461; see also REED & KARPILOW, *supra* note 5, at 11-12 (discussing case resolution times and deadlines for holding permanency hearings); FINAL REPORT, *supra* note 3, at 7 (observing that the percentage of reunifications in California occurring within twelve months of entry into foster care (53.2%) did not meet the national standard of 76.2% or more).

more than one in four children remain in care longer than three and a half years.⁵³ And the problem is expected to worsen. Although the number of children in foster care declined between 1998 and 2002,⁵⁴ experts expect a new trend of an increasing number of children to enter the system.⁵⁵

Other problems exist, too. An estimated 25% of California foster care children do not receive timely medical care, and almost 50% do not receive appropriate mental health services.⁵⁶ Upon leaving the California foster care system, approximately 33% of the children fail to complete high school, 33% spend time on welfare, 25% are arrested and spend time in jail, nearly 50% are unemployed, and almost 25% become homeless.⁵⁷ A University of Wisconsin study, from the late 1990s, reached similar conclusions when studying the foster care system nationally. That study found that after leaving foster care, 27% of males were incarcerated within twelve to eighteen months, 50% were unemployed, 37% did not graduate from high school, 33% were on public assistance, 47% were receiving counseling or medication for medical problems just before leaving the system,⁵⁸ and 33% were diagnosed with three or more psychiatric problems.⁵⁹

In part, the foster care system's problems are attributable to social workers failing to follow basic mandatory foster care requirements, such as a case plan, periodic reviews, and permanency hearings.⁶⁰ A 2000 Federal Audit of the California foster care system found that federal and state requirements were consistently not met and significant systemic problems existed.⁶¹ After

⁵³ LITTLE HOOVER COMM'N, *supra* note 7, at 2; *see also* Jim Moye & Roberta Rinker, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 376 (2002) (noting that in 1998, foster care children spent an average of three years in foster home care).

⁵⁴ Child Welfare Research Ctr., *supra* note 34, at 1.

⁵⁵ LITTLE HOOVER COMM'N, NOW IN OUR HANDS: CARING FOR CALIFORNIA'S ABUSED & NEGLECTED CHILDREN 23 (1999) (projecting the active foster care population to rise to 167,000 by 2005, assuming the caseload grows at the same rate as in the last eight years).

⁵⁶ Letter from the Little Hoover Commission to Governor Gray Davis and Members of the California Legislature, *supra* note 37, at 2.

⁵⁷ LITTLE HOOVER COMM'N, *supra* note 7, at 5; *see also* FOSTER, *supra* note 5, at 29.

⁵⁸ Moye & Rinker, *supra* note 53, at 377 (citing Barbara Vobejola, *At 18, It's Sink or Swim*, WASH. POST, July 21, 1998, at A1).

⁵⁹ *Id.* (citing Susan DosReis et al., *Mental Health Services for Youths in Foster Care and Disabled Youths*, 91 AM. J. PUB. HEALTH 1094 (2001)).

⁶⁰ 2000 AUDIT OF PROTECTIONS, *supra* note 4, at i, 7-8, 11-12, 13-14.

⁶¹ *Id.* at 4. As a result of a January 2003 review by the U.S. Department of Child and Family Services, the federal authorities threatened to withhold \$18 million unless California submitted a detailed plan to improve its child care services. Carla Rivera, *State's Plan to Upgrade Foster Care Approved*, L.A. TIMES, June 26, 2003, at B8. The media has recently spotlighted other problems with California's foster care system. *See, e.g.*, Troy Anderson, *257 Children Missing in Three Months*, L.A. DAILY NEWS, May 6, 2003, at N4 (noting that 759 foster children are listed as missing, and 257 children ran away or were abducted in the first three months of 2003); Sue Fox, *Audits Find Abuses in Foster Care Finances*, L.A. TIMES, July 15, 2003, at B1 ("Millions of taxpayer dollars meant to recruit and train foster

reviewing eighty-one foster care cases from seven counties, the Audit found:

- Fifty-eight of the eighty-one cases did not have case plans that met federal or state requirements, while the remaining twenty-three had no case plan at all.⁶²
- The periodic reviews of seventy-six out of eighty cases studied were deficient: most reviews were either not held on a timely basis, or not held at all.⁶³
- The permanency hearings for forty-seven of the fifty-two cases that required such hearings, failed to comply with statutory requirements.⁶⁴

Even the Department of Children and Family Services admits that social workers spend insufficient time with the foster children they are meant to protect.⁶⁵

The need for social workers to carefully supervise foster children because of the dangers of foster parent abuse is well understood: the problem of abuse in the California foster care system has received significant attention.⁶⁶ In the past few years, more than a dozen reports from various governmental and nongovernmental organizations have documented the California foster care

parents in Los Angeles County have instead been spent on country club memberships, trips to Disney World, luxury cars, a new office building, and the management of a clothing shop.”)

⁶² 2000 AUDIT OF PROTECTIONS, *supra* note 4, at 7.

⁶³ *Id.* at 8, 12-13 (explaining that of the eighty cases studied: (1) in eight cases no periodic reviews were held; (2) in twenty other cases there was one or more instances in which the required periodic review was not held; and (3) in thirty-seven cases one or more of the periodic reviews were not held in a timely manner).

⁶⁴ *Id.*

⁶⁵ Anderson, *supra* note 61 (quoting the director of the Los Angeles County Department of Child and Family Services, who stated that “social workers need to spend more time with foster children and develop relationships with them so they can spot the early signs of trouble”).

⁶⁶ See *supra* notes 1-2; see, e.g., Fox, *supra* note 61 (discussing recent Los Angeles County foster care finance audits); Jason B. Johnson, *Foster Care Fails State Kids*, S.F. CHRON., Jan. 14, 2003, at A15, available at 2003 WL 3745763 (noting that the U.S. Department of Health and Human Services has given California’s Department of Social Services ninety days to start making improvements or face monetary sanctions); Erin McCormick, *Alarming Breakdowns in State Foster Care*, S.F. CHRON., Dec. 1, 2002, at A1, available at 2002 WL 4037015 (discussing statistics and problems with California’s foster care system); Gayle Pollard-Terry, *Advice from Someone Who’s Been There*, L.A. TIMES, Jan. 20, 2003, at E1 (discussing film about Antwone Fisher, who was sexually abused and beaten while in California’s foster care system); Rivera, *supra* note 61 (discussing the federally approved plan to improve California’s child welfare services); Romo, *supra* note 9 (discussing the death of two children pushed to death from ninth floor of courthouse by their mother); Cheryl Romo, *Misty, Who Got No Breaks*, L.A. DAILY J., Nov. 12, 2002, at 1 (detailing horrific account of a rape of a foster child with Down’s syndrome); Matthew B. Stannard, *Judge Takes Responsibility in Death of Foster Child*, S.F. CHRON., Apr. 4, 2003, at A19, available at 2003 WL 3751984 (detailing a San Mateo County judge criticizing two social workers’ conduct and the county’s child welfare agency recommending reforms).

system's failings and have made recommendations for reform.⁶⁷ Between 1999 and 2002, the California Legislature considered over 100 bills intended to address child welfare system deficiencies.⁶⁸ In the last four years, although the number of foster children decreased,⁶⁹ total funding for the child welfare system increased by over \$699 million.⁷⁰ At the same time, California state agencies spent over \$8 million in research in an attempt to understand the failings of the system.⁷¹

Although children abused in the foster care system are not without legal recourse, their options are limited.⁷² Federal constitutional claims under 42 U.S.C. § 1983,⁷³ until recently, were not viable in California. Before July 2003, social workers in the Ninth Circuit were absolutely immune from federal suits for failure to protect children from foster parent abuse.⁷⁴ Although the law in the Ninth Circuit appears to be changing,⁷⁵ federal courts have been reluctant to allow children to press federal claims when state law provides a remedy.⁷⁶ In

⁶⁷ See, e.g., CAL. DEP'T OF SOC. SERVS., REEXAMINATION OF THE ROLE OF GROUP CARE IN A FAMILY-BASED SYSTEM OF CARE (2001); CENTER FOR THE FUTURE OF CHILDREN, THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT (1998); FOSTER, *supra* note 5 (2001); LITTLE HOOVER COMM'N, *supra* note 55, at 5. See generally LITTLE HOOVER COMM'N, *supra* note 7, at 6.

⁶⁸ LITTLE HOOVER COMM'N, *supra* note 7, at 7.

⁶⁹ Child Welfare Research Ctr., *supra* note 34, at 1; see also *supra* notes 54-55 (discussing the number of children in the foster care system).

⁷⁰ FED. CHILD & FAMILY SERVS. REVIEW PROJECT, STATE OF CALIFORNIA PROGRAM IMPROVEMENT PLAN FOR THE CHILD WELFARE SERVICES PROGRAM 2 (2003).

⁷¹ LITTLE HOOVER COMM'N, *supra* note 7, at 7.

⁷² Realistically, a child will be unlikely to obtain meaningful relief from the foster parents themselves. Often the foster parent is judgment-proof, and insurance will not cover abuse claims, which involve intentional torts. See CAL. HEALTH & SAFETY CODE §§ 1527-1527.3 (West 2000) (establishing Foster Care Fund, which will pay foster children claims on behalf of foster family homes, but excludes claims based on criminal or intentional acts, such as physical or sexual abuse). See generally Mushlin, *supra* note 44, at 250 (discussing the inadequacy of damage remedies in foster care abuse cases).

⁷³ 42 U.S.C. § 1983 (2000).

⁷⁴ See *Babcock v. Tyler*, 884 F.2d 497, 503-04 (9th Cir. 1989) (finding that state workers, including the child welfare agency, are entitled to absolute immunity from liability for placement in an abusive foster home), *overruling recognized by* *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003); see also *Meyers v. Contra Costa County Dep't of Soc. Servs.*, 812 F.2d 1154, 1158 (9th Cir. 1987); *Camp v. Gregory*, 67 F.3d 1286 (7th Cir. 1995). *But see* *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289 (8th Cir. 1993) (denying qualified immunity to a Human Services director, a caseworker, and a foster care parent because a state has an obligation to provide adequate medical care, protection, and supervision with respect to children removed from parents and placed in foster homes). For a discussion of an apparent circuit split as to whether a constitutional right to safe foster care placement exists, and the difficulty in succeeding on such a claim, see *Dine*, *supra* note 18, at 513-15.

⁷⁵ See *Miller*, 335 F.3d at 898-99 (recognizing the overturning of a decade of Ninth Circuit law by holding that social workers are not entitled to absolute immunity).

⁷⁶ Since the landmark Supreme Court *Deshaney* case, claims against a social service agency or a county for negligence in the placement or supervision of a child in foster care are often brought under state tort law. *Deshaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S.

California, a state-law claim would be brought under the California Tort Claims Act.⁷⁷

II. LEGAL BACKGROUND: THE CALIFORNIA TORT CLAIMS ACT

In 1963, the California Legislature enacted several statutory provisions that have become known as the California Tort Claims Act.⁷⁸ The Tort Claims Act abolished absolute sovereign immunity and eliminated “all common law or judicially declared forms of liability for public entities”⁷⁹ As a result, since 1963, all government tort liability in California has been based on statute.⁸⁰ In enacting the Tort Claims Act, the legislature carefully considered arguments for why absolutely immunizing governments from liability could be justified for public policy reasons – but ultimately rejected them.

A. *The Enactment of the Tort Claims Act And The Rejection of Absolute Immunity*

The 1960s marked the end of absolute governmental immunity in California. Before then, government entities in California were generally immune from liability for acts undertaken in a governmental capacity.⁸¹ In 1961, however, two California Supreme Court decisions—*Muskopf v. Corning Hospital District*⁸² and *Lipman v. Brisbane Elementary School District*⁸³—

189, 201 (1989) (“[I]t may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger.”). See generally Margaret J. Ryan, Comment, *The Status of Civil Liability when Child Protection Workers Fail to Do Their Jobs*, 14 S. ILL. U. L.J. 573 (1990) (arguing that since *Deshaney*, a viable alternative to bringing a federal action is to assert state law claims).

⁷⁷ CAL. GOV'T CODE §§ 810-996.6 (West 1995 & Supp. 2004).

⁷⁸ This legislation became effective on September 20, 1963. Although the legislature did not give a “short title” to these interrelated provisions, they are collectively known as the Tort Claims Act. Michael J. v. Los Angeles County Dep't of Adoptions, 247 Cal. Rptr. 504, 507 (Ct. App. 1988). For a discussion of the six separate components of the Tort Claims Act, see CEB, CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE § 2.5 (Lawrence M. Freiser et al. eds., 3d ed. 1992) [hereinafter CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE].

⁷⁹ *Becerra v. County of Santa Cruz*, 81 Cal. Rptr. 2d 165, 168 (Ct. App. 1998) (quoting *Harshbarger v. City of Colton*, 243 Cal. Rptr. 463, 465 (Ct. App. 1988)); see also *Cochron v. Herzog Engraving Co.*, 205 Cal. Rptr. 1, 3 (Ct. App. 1984).

⁸⁰ CAL. GOV'T CODE §§ 810-996.6 (West 1995 & Supp. 2004); see also *Becerra*, 81 Cal. Rptr. 2d at 168 (noting that liability may be based only on statute). See generally *Elson v. Public Utils. Comm'n*, 124 Cal. Rptr. 305, 309-11 (Ct. App. 1975) (discussing the legislative history behind the California Tort Claims Act).

⁸¹ *Elson*, 124 Cal. Rptr. at 308 (citing *Talley v. N. San Diego County Hosp. Dist.*, 257 P.2d 22 (Cal. 1953)). See generally Arvo Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963).

⁸² 359 P.2d 457 (Cal. 1961).

⁸³ 359 P.2d 465 (Cal. 1961).

abolished sovereign immunity. In *Muskopf*, the court proclaimed that the doctrine of sovereign immunity was no longer available to protect public entities from liability.⁸⁴ Instead, the *Muskopf* court held that "[g]overnment officials [would be] liable for the negligent performance of their ministerial duties . . . but [would] not be liable for their discretionary acts . . . even if it is alleged that they acted maliciously."⁸⁵ It found the "rule of governmental immunity for tort [to be] an anachronism, without rational basis and [a rule that had] existed only by the force of inertia."⁸⁶ Likewise, the *Lipman* court indicated that although government employees are entitled to immunity for "discretionary" decisions,⁸⁷ public entities can be liable for their employees' negligent operational and ministerial acts.⁸⁸

In response, the California Legislature enacted a moratorium statute suspending the effect of these twin decisions to study the governmental immunity issue.⁸⁹ The Legislature appointed a Law Revision Commission, which recommended that public entities be held liable when an entity fails to exercise reasonable diligence to comply with mandatory duties, and to the same extent as its employees could be held liable.⁹⁰ Although the Commission acknowledged the need to limit governmental liability, it also recognized that absolutely immunizing the government from any liability would be unwarranted:

[I]t would be harsh and unjust to deny compensation to all persons injured as the result of the wrongful or negligent acts or omissions of public employees. Government operates for the benefit of all; hence, it is reasonable to expect that all should bear some of the burden of the injuries that are wrongfully inflicted by the government.⁹¹

Consequently, the Law Review Commission recommended that the legislature follow the lead set by *Muskopf* and *Lipman* and abolish absolute

⁸⁴ *Muskopf*, 359 P.2d at 462-63.

⁸⁵ *Id.*

⁸⁶ *Id.* at 460 (citing Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924); James A. Casner & Edgar Fuller, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941); John Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROBS. 214 (1942)).

⁸⁷ *Lipman*, 359 P.2d at 467.

⁸⁸ *Id.* See generally *Elson v. Public Utils. Comm'n*, 124 Cal. Rptr. 305, 308 (Ct. App. 1975) (discussing extensively the legislative history of the Tort Claims Act).

⁸⁹ *Brown v. Poway Unified Sch. Dist.*, 843 P.2d 624, 630 (Cal. 1993) (citing to the Moratorium Act, ch. 1404, 1961 Cal. Stat. 3209); see also CAL. CIV. CODE § 22.3 (West 1982) (repealed 1979).

⁹⁰ Cal. Law Revision Comm'n, *Recommendations Relating to Sovereign Immunity*, 4 CAL. L. REVISION COMMISSION REP. 801, 815-16 (1963); *Nestle v. City of Santa Monica*, 496 P.2d 480, 487-88, n.7 (Cal. 1972) (en banc) (explaining history of Tort Claims Act and Law Review Commission studies); see also *Van Arsdale v. Hollinger*, 437 P.2d 508, 511 (Cal. 1968) (explaining that the recommendations of the Law Commission are entitled to substantial weight in construing the meaning of the Tort Claims Act), *overruled on other grounds by Privette v. Superior Court*, 854 P.2d 721 (Cal. 1993).

⁹¹ Cal. Law Revision Comm'n, *supra* note 90, at 810; see also *Elson*, 124 Cal. Rptr. at 310.

immunity.

B. *Policy Considerations Underlying Governmental Tort Liability*

The Legislature, in deciding whether to follow the Law Review Commission recommendations, was acutely aware of the competing policies that underlie governmental immunity issues. Understanding these policies is necessary to understand what the Legislature intended when it enacted the Tort Claims Act. The policies are also important because a court must focus on policy considerations in deciding whether discretionary act immunity applies.⁹²

1. *Policies favoring immunity: separation of powers and over deterrence.*

Two policy rationales support granting governmental actors immunity from tort claims. The first, and most often cited, rationale supporting limiting governmental liability is separation of powers.⁹³ This policy is rooted in the notion that the judiciary should not second-guess the decisions of a governmental agency (here, the case worker or social service agency).⁹⁴ Judicial policy making is inappropriate because "such judgments are more

⁹² *Nunn v. State*, 677 P.2d 846, 849 (Cal. 1984) (en banc); *Sanborn v. Chronicle Publ'g Co.*, 556 P.2d 764, 768-69 (Cal. 1976); see also *Johnson v. State*, 447 P.2d 352, 358 (Cal. 1968) (eschewing a literal approach to defining "discretionary actions" and concentrating instead on policy considerations relevant to the immunity claim). See generally CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, *supra* note 78, § 2.115 (noting that to determine the scope of discretionary immunity "the judicial process must be focused principally on the policy considerations relevant to the purpose of the immunity").

⁹³ See *Johnson*, 447 P.2d at 360 (discussing separation of powers as a rationale for governmental immunity); see also *Owen v. City of Independence*, 445 U.S. 622, 648 (1980) (reasoning that in context of municipal functions, protecting cities from suits challenging discretionary decisions is based on "a concern for separation of powers For a court or jury, in the guise of a tort suit, to review the reasonableness of the city's judgment on these matters would be an infringement upon the powers properly vested in a coordinate and coequal branch of government."); *Kaisner v. Kolb*, 543 So. 2d 732, 737 (Fla. 1989) (holding that governmental immunity is derived entirely from the doctrine of separation of powers). See generally Mark C. Niles, "Nothing But Mischief": *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1308-15, 1337-43 (2002) (discussing separation of powers as a justification for governmental immunity); Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 102-13 (2002) (arguing that separation of powers is the only valid basis for governmental immunity); Laura Huber Martin, Comment, *Caseworker Liability for the Negligent Handling of Child Abuse Reports*, 60 U. CIN. L. REV. 191, 217 (1991) (arguing that the "primary justification for sovereign immunity is the separation of powers doctrine").

⁹⁴ See, e.g., *United States v. S.A. Empresa de Viacao Arerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (noting that governmental immunity for discretionary acts is required to "prevent second-guessing of legislative and administrative decisions grounded in [policy]"); see also Mauricia Allen, Note & Comment, *The Georgia Tort Claims Act: A License for Negligence in Child Deprivation Cases?*, 18 GA. ST. U. L. REV. 795, 821-22 (2002).

appropriately left to the political branches of our governmental system, and because courts, which specialize in the resolution of discrete factual and legal disputes, are not equipped to make broad policy judgments."⁹⁵ Basic policy choices made by governmental agencies involve decisions concerning the use of resources and the balancing of competing interests of various constituencies.⁹⁶ Accordingly, there should be judicial abstention in areas where the responsibility for basic policy decisions has been committed to a coordinate branch of government.⁹⁷

A related, but different policy often urged to justify immunity, is that government workers should be free to exercise their judgment without constant fear of liability. With broad liability, public employees might be too cautious in their decision-making:

The justification for [immunity] is that it is impossible to know whether the claim is well-founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.⁹⁸

A governmental actor's knowledge that he or she could be subjected to civil liability could also negatively affect his or her performance.⁹⁹ Without some limitation on litigation, a government official may become "so inundated

⁹⁵ Niles, *supra* note 93, at 1308.

⁹⁶ *Nunn*, 677 P.2d at 849; *see also* RESTATEMENT (SECOND) OF TORTS § 895B cmt. d (1979) (noting that the "allocation of [the] available resources [may] be treated as a matter of political discretion" not subject to judicial review); Niles, *supra* note 93, at 1312 ("Policy choices invariably involve decisions concerning the use of scarce and/or expensive resources, and the balance of competing interests of various constituencies.").

⁹⁷ *Johnson*, 447 P.2d at 361 n.8 (explaining that the purpose of immunity is "to insure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government . . . [if] such a policy decision, consciously balancing risks and advantages, took place."); *see also Nunn*, 677 P.2d at 849 (explaining that the "underlying reason for granting immunity" is "to ensure judicial abstention" from interfering with policy-making committed to the executive branch).

⁹⁸ *Johnson*, 447 P.2d at 358; *accord Hardy v. Vail*, 311 P.2d 494, 496-97 (Cal. 1957); *Elson v. Public Utils. Comm'n*, 124 Cal. Rptr. 305, 309 (Ct. App. 1975) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)); *see also Tenney v. Bradhove*, 341 U.S. 367, 373-77 (1951) ("[I]t is indispensably necessary, that [the government official] enjoy the fullest liberty [and that he or she] be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense."); *Caldwell v. Montoya*, 897 P.2d 1320, 1324, 1326 (Cal. 1995) (noting the "vital public interest in securing free and independent judgment" of public sector employees and that "fear of civil lawsuits might deter officials from the zealous and unflinching discharge of their public duties").

⁹⁹ Niles, *supra* note 93, at 1307-08; *see also* Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1153-54 (1981) (discussing the "over deterrence" impact of personal liability for government officials).

with civil claims that they would not be able to, or would at least be severely handicapped in, performing their normal duties.”¹⁰⁰ Accordingly, extensive liability would over deter and foster inefficient or ineffective government.

Both policies, however, have limited, if any, application when mandatory or non-policy-based decisions are involved. The separation of powers concern does not apply when an employee departs from a statutorily mandated path or performs an operational decision.¹⁰¹ In such circumstances, a court is not second-guessing a policy judgment.¹⁰² Rather, the court is merely enforcing the law. So too, the fear-of-liability/over deterrence rationale for limiting liability is not often implicated. The Tort Claims Act provides substantial protection to employees through indemnification (absent bad faith).¹⁰³ The Act also provides employees a defense at public expense, when employees are sued for their official acts or omissions.¹⁰⁴ These protections significantly reduce, if not eliminate, the dangers perceived in chilling employee ardor.¹⁰⁵ Indeed, the California Supreme Court has held that a governmental actor’s fear of liability can not serve as a reason for granting immunity.¹⁰⁶ It reaffirmed that holding as recently as 2000.¹⁰⁷

2. Policies favoring liability: deterrence, loss spreading, and fairness.

On the other hand, several policies favor imposing liability for a

¹⁰⁰ Niles, *supra* note 93, at 1308 (citing *Sigbert v. Gilley*, 895 F.2d 797, 803-04 (D.C. Cir. 1990)); see also Cass, *supra* note 99, at 1153-60; Robert G. Shaffer, *The Public Interest in Private Party Immunity: Extending Qualified Immunity from 42 U.S.C. Section 1983 to Private Prisons*, 45 DUKE L.J. 1049, 1059 (1996).

¹⁰¹ *Johnson*, 447 P.2d at 361; cf. *United States v. Gaubert*, 499 U.S. 315, 324 (1991) (“If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy.”).

¹⁰² *Johnson*, 447 P.2d at 361 (admonishing courts not to second-guess policy decisions of other branches of government).

¹⁰³ CAL. GOV’T CODE §§ 825-825.6, 995-995.6 (West 1995 & Supp. 2004).

¹⁰⁴ *Id.* See generally CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, *supra* note 78, §§ 2.89-2.90, 6.143-6.156.

¹⁰⁵ *Johnson*, 447 P.2d at 359.

¹⁰⁶ *Id.* at 360-61; *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 350 n.21 (Cal. 1976) (“We dismissed, in *Johnson*, the view that immunity continues to be necessary in order to insure that public employees will be sufficiently zealous in the performance of their official duties. The California Tort Claims Act of 1963 provides for indemnification of public employees against liability, absent bad faith, and also permits such employees to insist that their defenses be conducted at public expense . . . Public employees thus no longer have a significant reason to fear liability as they go about their official tasks. We also, in *Johnson*, rejected the argument that a public employee’s concern over the potential liability of his or her employer serves as a basis for immunity.”).

¹⁰⁷ *Barner v. Leeds*, 13 P.3d 704, 713 (Cal. 2000) (“[F]ears that personal exposure to damage suits and judgments would deter the vigorous performance of public responsibilities are no longer a policy basis for immunity.”) (quoting *Caldwell v. Montoya*, 897 P.2d 1320 (Cal. 1995)); see also *Ma v. City & County of San Francisco*, 115 Cal. Rptr. 2d 544, 567 n.14 (Ct. App. 2002) (rejecting litigation fear as a basis for granting immunity).

government's negligent acts. The first is deterrence. Immunizing governmental actors from liability would remove a critical check on governmental behavior.¹⁰⁸ The government – just like any private actor – will be more careful and less likely to be negligent if forced to internalize the costs of its actions.¹⁰⁹ Potential liability also induces governmental workers to be more careful. Failure to use care would result in the stigma of being found negligent and the possibility of disciplinary action.¹¹⁰

More fundamentally, finding government liability in certain circumstances would further the traditional tort theory that a negligent actor should compensate the innocent victim, and promotes goals of corrective and distributive justice, loss spreading, and fairness.¹¹¹ A government “is a more appropriate candidate to bear the costs incurred by its negligent acts than the private citizen who sustains an injury through no ‘fault’ of her own.”¹¹² Some even argue that a government is an ideal tort defendant, because it has the unique ability to spread losses arising from tort liability through taxes.¹¹³ The

¹⁰⁸ Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871, 885-907 (1991) (arguing that narrowly construing immunities imposes a critical check against governmental wrongdoing through deterrence).

¹⁰⁹ *Id.* at 872 (“If the theory of tort law is in part to compel private entities to become more efficient in light of potential tort liability, then there is no apparent reason why potential liability should not similarly force the government to be more prudent in its operations.”); see also Allen, *supra* note 94, at 824 (“Like any private business, forcing the state (or federal) government to internalize negligence costs creates incentives for the state to act more safely.”).

¹¹⁰ Krent, *supra* note 108, at 886 (“Others may be motivated to avoid liability by more personal incentives, whether to avoid the stigma of being found negligent or to avoid possible disciplinary action by their superiors.”). See generally Barry R. Goldman, Note, *Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act*, 26 GA. L. REV. 837, 853-54 (1992) (“[T]he stigma attached to creating liability for the agency might deter a government agent from actively promulgating and enforcing contentious agency policies.”).

¹¹¹ Niles, *supra* note 93, at 1294-95.

¹¹² *Id.*; see also John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82 (1989) (discussing theories of distributive justice and loss spreading in connection with governmental liability). Basic notions of fairness dictate that innocent plaintiffs (whether they are children or adults) should not be left without a remedy. The need to provide an innocent victim a remedy has long driven courts' decisions. See, e.g., *Sindell v. Abbott Labs.*, 607 P.2d 924, 936 (Cal. 1980) (“The most persuasive reason for finding plaintiff states a cause of action is that advanced in [*Summers v. Tice*]: as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury.”); *Summers v. Tice*, 199 P.2d 1 (Cal. 1948) (holding that negligent defendants should bear costs, not innocent plaintiffs); *Kingston v. Chicago & Northwestern Ry. Co.*, 211 N.W. 913 (Wis. 1927) (finding that the defendant railroad company was liable for the entire damage to the plaintiff's property, even though but for the defendant's negligence the plaintiff's property would have been destroyed anyway, because to hold otherwise would allow a known wrongdoer to escape liability and leave an innocent plaintiff without a remedy).

¹¹³ James R. Levine, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1553 (2000) (arguing that the governmental budget should be

California Supreme Court has recognized as much: "[I]t would be unjust in some circumstances to require an individual injured by official wrongdoing to bear the burden of his loss, rather than distribute it throughout the community."¹¹⁴ Indeed, as one California court has explained, notions of fairness strongly dictate against granting governmental immunity:

This limitation upon immunities is manifestly just. An immunity is, after all, a license to *harm*. Thus, it should not extend beyond those functions which are so necessary to the public good that the public benefit from the free exercise of discretion in such functions plainly outweighs the private harm that may flow from misfeasance.¹¹⁵

C. *A Resolution Of The Policy Considerations: The Statutory Framework*

In weighing these different policies, the Legislature attempted to strike a balance with the California Tort Claims Act. But the balance is weighted heavily in favor of liability. Where there is negligence, "liability for resulting harm is the rule, and immunity is the exception."¹¹⁶ Accordingly, governmental immunities must be "strictly construed."¹¹⁷ The burden is on the government to prove that the immunity should be conferred.¹¹⁸ The California Legislature's resolution of the policy concerns resulted in a Tort Claims Act that was intended to: (1) create liability on the part of governmental entities when injury was caused by a failure to perform a mandatory duty; (2) abolish absolute immunity and make public entities liable when their employees were liable; and (3) continue the immunity granted to public employees for their policy-

adjusted to accommodate an expansion of tort liability to "spread the loss caused by government activity rather than leave the burden on the unlucky individuals harmed by the government's negligence"); *see also* *Rayonier, Inc. v. United States*, 352 U.S. 315, 319-20 (1957) (discussing the benefits of spreading the cost and burden of governmental liability through taxes).

¹¹⁴ *Lipman v. Brisbane Elementary Sch. Dist.*, 359 P.2d 465, 467 (Cal. 1961).

¹¹⁵ *Scott v. County of Los Angeles*, 32 Cal. Rptr. 2d 643, 653 (Ct. App. 1994).

¹¹⁶ *Lopez v. S. Cal. Rapid Transit Dist.*, 710 P.2d 907, 915 (Cal. 1985); *accord Johnson v. State*, 447 P.2d 352, 363 (Cal. 1968); *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457, 462 (Cal. 1961); *Scott*, 32 Cal. Rptr. 2d at 652. *See generally* *Ramos v. County of Madera*, 484 P.2d 93, 98 (Cal. 1971) ("[T]he well-settled notion that in governmental tort cases, 'the rule is liability, immunity is the exception' Unless the legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail.").

¹¹⁷ *Scott*, 32 Cal. Rptr. 2d at 652 (citing *Sullivan v. County of Los Angeles*, 527 P.2d 865, 870-71 (Cal. 1974); *James W. v. Superior Court*, 21 Cal. Rptr. 2d 169, 175-76 (Ct. App. 1993)).

¹¹⁸ *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131, 1138 (N.D. Cal. 2000) ("Under California law, government defendants have the burden of proving that the actions of government employees fall within scope of a statutory immunity."); *Lopez*, 710 P.2d at 916 (finding government "must make showing that act complained of was a policy decision that consciously balance[d] risks and advantages") (quoting *Johnson*, 447 P.2d at 363); *Bell v. State*, 74 Cal. Rptr. 2d 541, 547 (Ct. App. 1998) (finding discretionary act immunity requires "proof that the specific conduct that gave rise to the suit involved" a basic policy decision).

based decisions.¹¹⁹

Accordingly, under the California Tort Claims Act, a governmental entity, such as a county or a social services agency, may be held liable in one of two ways.¹²⁰ First, a public entity may be directly liable if it fails to discharge a mandatory duty.¹²¹ Second, a public entity may be held derivatively liable for the acts or omissions of its employees.¹²² Derivative liability will not exist, however, if the employee made a "discretionary," policy-based decision, regardless of whether that employee was negligent.¹²³

1. *A government is directly liable for breach of mandatory duties.*

The negligence per se doctrine applies to public entities.¹²⁴ Under section 815.6 of the California Government Code¹²⁵ a three-pronged test applies to determine whether a governmental entity is directly liable. First, the public entity must be under a mandatory, not a discretionary, duty imposed by an enactment.¹²⁶ An "enactment" is defined to include constitutional provisions, statutes, charter provisions, ordinances or regulations.¹²⁷ Second, the enactment must be designed to protect against the risk of the particular kind of injury suffered by the party seeking to impose liability.¹²⁸ A plaintiff must show that the injury is "one of the consequences which the [enacting body] sought to

¹¹⁹ *Elson v. Pub. Utils. Comm'n*, 124 Cal. Rptr. 305, 311 (Ct. App. 1975) (concluding that the Tort Claims Acts history makes the intent of the legislature clear); see also CAL. GOV'T CODE § 820.2, legislative committee cmt. (West 1995).

¹²⁰ CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, *supra* note 78, § 2.53.

¹²¹ CAL. GOV'T CODE § 815.6 ("Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.").

¹²² *Id.* § 815.2(a) ("A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his [or her] employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee . . .").

¹²³ *Id.* § 820.2 (stating that a public employee is not liable for an injury resulting from an act or omission that was "the result of the exercise of the discretion vested in him [or her], whether or not such discretion be abused"); see also *id.* § 815.2.

¹²⁴ *Alejo v. City of Alhambra*, 89 Cal. Rptr. 2d 768, 771 n.3 (Ct. App. 2000).

¹²⁵ CAL. GOV'T CODE § 815.6.

¹²⁶ *Id.*; see also *Gray v. State*, 254 Cal. Rptr. 581, 583 (Ct. App. 1989) (setting forth the elements required to impose liability), *superseded by statute on other grounds as stated in* *Braman v. State*, 33 Cal. Rptr. 608, 609 (Ct. App. 1994); *State v. Superior Court*, 197 Cal. Rptr. 914, 918 (Ct. App. 1984) (setting forth required elements of liability). See generally *Morris v. County of Marin*, 559 P.2d 606 (Cal. 1977).

¹²⁷ CAL. GOV'T CODE § 810.6.

¹²⁸ *Id.* § 815.6 (imposing liability only when enactment "is designed to protect against the risk of a particular kind of injury"); see also *Haggis v. City of Los Angeles*, 993 P.2d 983, 987-88 (Cal. 2000); *Shelton v. City of Westminster*, 188 Cal. Rptr. 2d 205, 211 (Ct. App. 1984).

prevent through imposing the alleged mandatory duty.”¹²⁹ That the enactment confers some benefit on the class to which plaintiff belongs is not enough; if the benefit is “incidental” to the enactment’s purpose, the enactment cannot serve as a predicate for liability.¹³⁰ Third, the failure to diligently discharge that mandatory duty must be a proximate cause of the injury suffered.¹³¹ The Tort Claims Act thus “applies to public entities the familiar rule of tort law that violation of a legislatively prescribed standard of care creates a rebuttable presumption of negligence.”¹³²

California courts have struggled to define what a “mandatory duty” is. Generally, however, a mandatory duty is understood to refer to an “obligatory duty which a governmental entity is required to perform, as opposed to a permissive power that such entity may or may not exercise, as it chooses.”¹³³ The controlling question is whether the legislature intended that the enactment impose an obligation to take a specified action to prevent specific types of injuries.¹³⁴ An enactment that contains mere recitations of goals and policies therefore does not impose a mandatory duty to act.¹³⁵

In determining whether a statute imposes a mandatory duty, established principles of statutory interpretation must guide the court. Whether a mandatory duty exists is a question of law for the courts to decide.¹³⁶ A court must first determine legislative intent from the statutory language itself.¹³⁷ Only

¹²⁹ *Haggis*, 993 P.2d at 988 (quoting *Hoff v. Vacaville Unified Sch. Dist.*, 968 P.2d 522 (Cal. 1998)).

¹³⁰ *Id.*; *Sutherland v. City of Fort Bragg*, 102 Cal. Rptr. 2d 736, 741 (Ct. App. 2000).

¹³¹ *Haggis*, 993 P.2d at 988; *see also Ibarra v. Cal. Coastal Comm’n*, 227 Cal. Rptr. 371, 375 (Ct. App. 1986); *State v. Superior Court*, 197 Cal. Rptr. 914, 918 (Ct. App. 1984).

¹³² 35 CAL. JUR. 3D *Governmental Tort Liability* § 11 (2002) (citing *Lehto v. City of Oxnard*, 217 Cal. Rptr. 450 (Ct. App. 1985)); *see also* CAL. EVID. CODE § 669 (codifying negligence per se doctrine and creating rebuttable presumption of negligence when person violates “a statute, ordinance, or regulation of a public entity”).

¹³³ 35 CAL. JUR. 3D *Governmental Tort Liability* § 11; *see also Morris v. County of Marin*, 559 P.2d 606, 610 (Cal. 1977); *Posey v. State*, 225 Cal. Rptr. 830, 838 (Ct. App. 1986); *Fox v. County of Fresno*, 216 Cal. Rptr. 879, 881 (Ct. App. 1985).

¹³⁴ 35 CAL. JUR. 3D *Governmental Tort Liability* § 11; *see also Keech v. Berkeley Unified School Dist.*, 210 Cal. Rptr. 7, 10 (Ct. App. 1984).

¹³⁵ *Ibarra*, 227 Cal. Rptr. at 376; *cf. Searcy v. Hemet Unified Sch. Dist.*, 223 Cal. Rptr. 206, 211 (Ct. App. 1986) (finding enactments that are merely guidelines and advisory in nature do not create mandatory duties).

¹³⁶ *Nunn v. State*, 677 P.2d 846, 852 (Cal. 1984) (en banc); *see also Fox*, 216 Cal. Rptr. at 881 (asserting that whether a statute or ordinance is intended to create a mandatory duty is a question of law). In making a claim that a governmental entity has breached a mandatory duty, the specific statute that imposes the mandatory duty must be specifically identified in pleadings. *Sullivan v. City of Sacramento*, 235 Cal. Rptr. 844, 849 (Ct. App. 1987); *Searcy*, 223 Cal. Rptr. at 212.

¹³⁷ *Nunn*, 677 P.2d at 851-52. In the absence of a clearly expressed legislative intent to the contrary, the words of a statute are deemed conclusive. *Halstrom v. Tillamook County*, 493 U.S. 20, 28 (1989); *see also People v. Woodhead*, 741 P.2d 154, 157 (Cal. 1987) (“[S]ignificance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided.”).

when the statutory language is ambiguous may other factors be considered.¹³⁸ The language of the statute need not, however, manifest a legislative intent to create a private right of action.¹³⁹ Rather, courts have held that a mandatory duty exists so long as the duty is explicitly phrased in the enactment using obligatory language, such as "shall" or "must."¹⁴⁰ Only in a narrow set of circumstances is the presence of obligatory language not dispositive.¹⁴¹ Notwithstanding the use of the term "shall" or "must," a mandatory duty will not exist where the legislative intent is manifestly otherwise or where interpreting the statute literally would lead to an absurdity.¹⁴² Finally, because a statutory provision creates a mandatory duty in one area does not necessarily mean it imposes a mandatory duty in another related area.¹⁴³

¹³⁸ *Nunn*, 677 P.2d at 851-52.

¹³⁹ *Haggis v. City of Los Angeles*, 993 P.2d 983, 988 (Cal. 2000) (noting that the enactment establishing the mandatory duty does not need to manifest an intent to create a private right of action because that is the function of section 815.6) (citing *Crusader Ins. Co. v. Scottsdale Ins. Co.*, 62 Cal. Rptr. 2d 620, 623 (Ct. App. 1997)).

¹⁴⁰ *Morris v. County of Marin*, 559 P.2d 606, 610 (Cal. 1977); see CAL. GOV'T CODE § 14 (West 1995) (indicating that the word "shall" indicates mandatory, not permissive, language); see also CAL. BUS. & PROF. CODE § 19 (West 2003) ("Shall" is mandatory and "may" is permissive.); CAL. FAM. CODE § 12 (West 1994) ("Shall" is mandatory and "may" is permissive. "Shall not" and "may not" are prohibitory.); *Sullivan v. County of Los Angeles*, 527 P.2d 865, 867-68 (Cal. 1974) (interpreting statute using the word "must" to impose a mandatory duty); *Ramos v. County of Madera*, 484 P.2d 93, 99-100 (Cal. 1971) (finding that statutes using word "shall" regarding eligibility standards for government payments created mandatory duties); *Woodbury v. Brown-Dempsey*, 134 Cal. Rptr. 2d 124, 133 (Ct. App. 2003) (explaining that "[o]rdinarily, the word 'may' connotes a discretionary or permissive act; the word 'shall' connotes a mandatory or directory duty" and that "the Legislature is presumably aware of the ordinary meaning assigned to the words 'may' and 'shall.'"); *Decker v. U.D. Registry, Inc.*, 129 Cal. Rptr. 2d 892, 895-96 (Ct. App. 2003) ("Thus, 'in most cases,' the Legislature's use in a statute of the word 'shall' indicates that the statute's 'provisions are mandatory . . .'" (quoting *Abbett Electric Corp. v. Storek*, 27 Cal. Rptr. 2d 845, 850-51 (Ct. App. 1994)); *Judith P. v. Superior Court*, 126 Cal. Rptr. 2d 14, 25 (Ct. App. 2002) (holding that statute providing that a status report "shall" be filed and served at least ten days before status review hearing in dependency proceeding creates a mandatory duty). See generally *REA Enters. v. Cal. Coastal Zone Conservation Comm'n*, 125 Cal. Rptr. 201, 207-08 (Ct. App. 1975) (explaining that a "well established rule of statutory construction" is that the word "shall" connotes mandatory action).

¹⁴¹ *Morris*, 559 P.2d at 612 n.6 ("Although statutory language is . . . a most important guide in determining legislative intent, there are unquestionably instances in which other factors will indicate that apparently obligatory language was not intended to foreclose . . . [the] exercise of discretion."); *Estate of DePasse v. Harris*, 118 Cal. Rptr. 2d 143, 151-52 (Ct. App. 2002) ("Whether the words 'must' or 'shall' should be construed as mandatory or directory depends on the intention of the Legislature in enacting the particular code section.").

¹⁴² See, e.g., *Nunn*, 677 P.2d at 851; *Cancun Homeowners Ass'n v. City of San Juan Capistrano*, 264 Cal. Rptr. 288, 291 (Ct. App. 1989). See generally *Creason v. Dep't of Health Servs.*, 957 P.2d 1323, 1328 (Cal. 1998) (citing *Morris*, 559 P.2d at 612 n.6); CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, *supra* note 78, § 2.76 (listing cases finding no mandatory duty despite use of the word "shall").

¹⁴³ See, e.g., *Becerra v. County of Santa Cruz*, 81 Cal. Rptr. 2d 165, 170 (Ct. App. 1998) (finding that mandatory duty to assess factors as part of county's foster care placement

2. *A government is derivatively liable for its employees' negligence if the employee is not immune.*

In addition to direct liability, a government agency may also be derivatively liable for its employees' acts or omissions,¹⁴⁴ provided that the employee is not immune from liability.¹⁴⁵ Immunity exists for an employee's "discretionary" acts committed within the scope of his or her employment.¹⁴⁶ As section 820.2 of the California Government Code explains, "[e]xcept as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."¹⁴⁷

Courts must use caution when determining whether discretionary act immunity should be conferred on a government employee's acts: the word "discretionary" does not have a literal interpretation.¹⁴⁸ In the landmark case construing when an act is discretionary, *Johnson v. State of California*,¹⁴⁹ the California Supreme Court held that the mere existence of a discretionary choice in the act performed does not automatically confer immunity.¹⁵⁰ Rather, only planning-level activities, which require the governmental employee to make

decision did not impose mandatory duty as to what ultimate placement must be made); *Brenneman v. State*, 256 Cal. Rptr. 363, 366 (Ct. App. 1989) (distinguishing mandatory duty to assess parolee's risk from any specific requirement to take action); *Gray v. State*, 254 Cal. Rptr. 581, 583 (Ct. App. 1989) (finding that a statute requiring the California Department of Justice to notify a gun dealer of purchaser eligibility to possess weapon if purchaser fits into a particular category did not impose a duty to conduct investigation); *Rose v. County of Plumas*, 199 Cal. Rptr. 842, 847 (Ct. App. 1984) (concluding that a statutory duty to train police officers in first aid did not create a mandatory duty to render aid).

¹⁴⁴ CAL. GOV'T CODE § 815.2(a) (West 1995); see also *Brenneman*, 256 Cal. Rptr. at 367.

¹⁴⁵ *Id.* §§ 815.2(b), 820.2.

¹⁴⁶ *Id.* § 820.2.

¹⁴⁷ *Id.* Many acts or omissions that are accorded immunity under section 820.2 as discretionary acts are also immunized under other specific statutory provisions. See, e.g., *id.* §§ 818.4, 821.2 (immunizing the issuance, denial, and revocation of permits, certificates, and licenses); see also *Morris*, 559 P.2d at 614 n.7 (noting that "many of the individual immunity provisions . . . simply represent specific applications of the general 'discretionary' immunity principle").

¹⁴⁸ *Caldwell v. Montoya*, 897 P.2d 1320, 1325 (Cal. 1995) ("Almost all acts involve some choice among alternatives, and the statutory immunity thus cannot depend upon a literal or semantic parsing of the word 'discretion.'"); see, e.g., *Sanborn v. Chronicle Pub. Co.*, 556 P.2d 764, 769 (Cal. 1976) (concluding that although the decision to discuss a matter with the press may have been within clerk's discretion, as that term is used in common parlance, it was not "in the nature of a 'basic policy decision' made at the 'planning' stage of City's operations" but rather fell within the category of routine duties incident to the normal operations of the office of the clerk).

¹⁴⁹ 447 P.2d 352 (Cal. 1968).

¹⁵⁰ *Id.* at 363. See generally CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE § 10.11-16 (Robert Waxman ed., 4th ed. 1999 & Supp. 2003) (describing *Johnson* holding and explaining that a semantic or literal approach to "discretion" has been repeatedly rejected by the California Supreme Court).

basic policy choices, are entitled to immunity.¹⁵¹ Operational decisions, which only implement policy, are not immunized.¹⁵² This distinction is sound, because virtually all acts by governmental employees involve some degree of choice.¹⁵³ Only when a "basic policy" decision is made does the employee's act constitute an exercise of "discretion" by a coordinate branch of government that "remain[s] beyond the range of judicial inquiry."¹⁵⁴ The discretionary act immunity exception to the general rule of liability is thus a narrow one. The Legislature intended it to be "no greater than is required to give legislative and executive policymakers sufficient breathing space in which to perform their vital policymaking functions."¹⁵⁵

In determining whether an employee has engaged in a basic policy decision, the status of the governmental employee, although not determinative, is relevant. Immunity may be denied to employees who occupy positions "at the lowest ministerial rung of official action."¹⁵⁶ This is because basic policy

¹⁵¹ *Johnson*, 447 P.2d at 356-58; see also *Barner v. Leeds*, 13 P.3d 704, 709 (Cal. 2000) (noting that immunity is reserved for only "basic policy decisions" which have been committed to coordinate branches of government); *Caldwell*, 897 P.2d at 1324-25 (quoting *Johnson* and explaining that immunity is reserved for "basic policy decisions"). Notably, other states also only immunize governmental activity when basic policy decisions are involved. See, e.g., *Commercial Carrier v. Indian River County*, 371 So. 2d 1010, 1021-22 (Fla. 1979) (finding that governmental immunity only applies to policy-based decisions and surveying other states' laws to find general agreement among the states); Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447 (1997) (explaining that state laws in California, Delaware, Hawaii, Indiana, Louisiana, Minnesota, Montana, New Jersey, Oregon, Utah, and Washington find that discretionary act immunity applies only when the government shows that its employee actually balanced public policy concerns in his or her decision); Susan Lynn Abbott, Note, *Liability of the State and Its Employees for the Negligent Investigation of Child Abuse Reports*, 10 ALASKA L. REV. 401, 417-18 (1993) (noting that immunity applies only to "basic policy decisions").

¹⁵² *Johnson*, 447 P.2d at 356-58; see also *Barner*, 13 P.3d at 710 n.2 (affirming the planning and operational decision distinction); *Caldwell*, 897 P.2d at 1325 (discussing *Johnson*'s planning and operational decisions distinction as a workable test for discretionary act immunity).

¹⁵³ *Johnson*, 447 P.2d at 356-58; see also *Ham v. County of Los Angeles*, 189 P. 462, 468 (Cal. Ct. App. 1920) ("[I]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail."); CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, *supra* note 78, § 2.115 ("[T]aken literally, the term 'discretionary' lends itself to such a wide range of applications that it could conceivably nullify almost all vicarious liability of public entities under the Tort Claims Act for employee torts—a result clearly inconsistent with legislative intent.").

¹⁵⁴ *Johnson*, 447 P.2d at 360 (quoting 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 25.11 (1958)); see also *Barner*, 13 P.3d at 710 n.2; cf. *United States v. Gaubert*, 499 U.S. 315, 325 (1991) ("A discretionary act is one that involves choice or judgment Discretionary conduct is not confined to the policy or planning level.").

¹⁵⁵ *Tarasoff v. Regents of the Univ. of Calif.*, 551 P.2d 334, 350 (Cal. 1976) (citing *Johnson*, 447 P.2d at 360); see also *Barner*, 13 P.3d at 709. See generally *supra* Part II.B.1.

¹⁵⁶ *Johnson*, 447 P.2d at 362. But cf. *Dalehite v. United States*, 346 U.S. 15, 33 (1953) (conferring immunity to "all [federal] employees exercising discretion," regardless of status).

decisions are normally only made by relatively high-ranking public employees.¹⁵⁷ Relatedly, courts have “no duty to abstain from reviewing the choices of a government employee without authorization or special expertise for making policy decisions.”¹⁵⁸ Discretionary act immunity “is an acknowledgement that courts lack the political authority and expertise to evaluate decisions based on policy variables.”¹⁵⁹ Therefore, as Justice Scalia has observed, immunity should be reserved for policy decisions where agency expertise is utilized, by “an officer whose official responsibilities include assessment of [social, economic, or political policy] considerations.”¹⁶⁰

Even if an act by an employee is classified as discretionary, a government may still be held derivatively liable if the injury resulted “not from the employee’s exercise of ‘discretion vested in him’ to undertake the act, but from his negligence in performing it after having made the discretionary decision to do so.”¹⁶¹ Courts have recognized that “although a basic policy decision may be discretionary and thus warrant governmental immunity, subsequent operational actions in the implementation of that decision still must face case-by-case adjudication on the question of negligence.”¹⁶² Accordingly, a public entity may be liable for the “ministerial” acts of its employees.¹⁶³

The distinction between policy and operational or ministerial decisions, for purposes of determining whether governmental immunity exists, is firmly

¹⁵⁷ CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, *supra* note 78, § 2.118; *see also* Evan J. Mandery, *Qualified Immunity or Absolute Impunity? The Moral Hazards of Extending Qualified Immunity to Lower-Level Public Officials*, 17 HARV. J.L. & PUB. POL’Y 479 (1994) (criticizing the apparent application, in federal law, of qualified immunity to low-level officials); Mark M. Myers, *A Unified Approach to State & Municipal Tort Liability in Washington*, 59 WASH. L. REV. 533, 536 (1984) (arguing that immunity should only attach to high-level governmental actors that create public policy).

¹⁵⁸ Peterson & Van Der Weide, *supra* note 151, at 491.

¹⁵⁹ *Id.*

¹⁶⁰ *United States v. Gaubert*, 499 U.S. 315, 335 (1991) (Scalia, J., concurring).

¹⁶¹ *McCorkle v. Los Angeles*, 449 P.2d 453, 460 (Cal. 1969) (en banc) (citing *Johnson*, 447 P.2d at 356); *see also* *Lopez v. S. Cal. Rapid Transit Dist.*, 710 P.2d 907, 915 (Cal. 1985) (finding that “subsequent ministerial actions taken in the implementation of” discretionary policy decisions are not immunized); *Newton v. County of Napa*, 266 Cal. Rptr. 682, 687-88 (Ct. App. 1990) (finding that a welfare department official’s decision to conduct an investigation of child abuse is immune from liability, but that this does not preclude liability for actions implied in the decision to investigate); *Sava v. Fuller*, 57 Cal. Rptr. 312, 317 (Ct. App. 1967) (“[O]nce the determination has been made that a service will be furnished and the service is undertaken, then public policy demands (except when the Legislature specifically decrees otherwise) that the government be held to the same standard of care as the law requires of its private citizens . . .”).

¹⁶² *Barner v. Leeds*, 13 P.3d 704, 711 (Cal. 2000).

¹⁶³ *McCorkle*, 449 P.2d at 459; *see also* *Barner*, 13 P.3d at 709 (“[T]here is no basis for immunizing lower level decisions that merely implement a basic policy already formulated.”); *Ramos v. County of Madera*, 484 P.2d 93, 98-99 (Cal. 1971) (en banc) (explaining that actors making low level ministerial decisions are not protected by immunity).

entrenched in California jurisprudence. To be sure, commentators have criticized this distinction, claiming that it unduly limits the scope of immunity.¹⁶⁴ Some have even urged the California Supreme Court to overrule *Johnson* and adopt a literal definition of "discretionary."¹⁶⁵ Applying such a literal approach might be more consistent with Federal Tort Claims Act cases that grant broader immunity, including immunity for operational decisions involving the exercise of judgment.¹⁶⁶ But the California Supreme Court has repeatedly rejected these urgings and has refused to overturn *Johnson*.¹⁶⁷

Even if we were inclined to disagree with the principles set forth in *Johnson*, we do not believe it would be appropriate to overrule or disapprove more than three decades of precedent applying authoritative settled statutory construction that has been central to the analysis and holdings of these decisions. . . . The principles underlying the doctrine of stare decisis apply with special force in the context of statutory interpretation, because the Legislature remains free to alter what we have done.¹⁶⁸

¹⁶⁴ *Barner*, 13 P.3d at 710 n.2. Some commentators suggest that *Johnson* may be inconsistent with the intent of the Tort Claims Act. The merits of this argument are debatable, but whether *Johnson* is, in fact, inconsistent with the Act is a moot issue. The legislature's inaction over thirty years indicates it has acquiesced in the *Johnson* interpretation. *Id.*; see, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983) ("In view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced in the IRS rulings."); *People v. Meloney*, 70 P.3d 1023, 1034 (Cal. 2003) (noting that when a "statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it") (citations omitted). The continuing legislative acquiescence to *Johnson* "bespeaks ratification more than rejection." CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, *supra* note 78, § 2.117.

¹⁶⁵ *Barner*, 13 P.3d at 710 n.2.

¹⁶⁶ *Id.*; see also *United States v. Gaubert*, 499 U.S. 315, 325 (1991) ("A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions."); cf. *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988) (noting immunity attaches to governmental "actions or decisions based on considerations of public policy"). Even federal law, however, immunizes only discretionary decisions that have some relationship to public policy. See, e.g., *Coulthurst v. United States*, 214 F.3d 106, 108-09 (2d Cir. 2000) (explaining that *Berkovitz* and *Gaubert* immunize only discretionary decisions that are "grounded in considerations of public policy" or susceptible to policy analysis); *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1130, 1135-36 (10th Cir. 1999) (describing subsequent interpretations of *Berkovitz* which lighten the government's burden regarding when an official exercise of discretion is susceptible to policy analysis).

¹⁶⁷ See, e.g., *Creason v. State Dep't of Health Servs.*, 957 P.2d 1323, 1329-30 (Cal. 1998) (applying *Johnson*'s distinction between operational and planning decisions); *Lopez v. S. Cal. Rapid Transit Dist.*, 710 P.2d 907, 915 (Cal. 1985) (applying *Johnson*'s distinction between operational and planning decisions, and indicating that immunity is conferred only for "basic policy decisions"); see also *Nunn v. State*, 677 P.2d 846, 849-50 (Cal. 1984) (en banc); *Sanborn v. Chronicle Publ'g Co.*, 556 P.2d 764, 768-69 (Cal. 1976); *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 349-50 (Cal. 1976); *Ramos v. County of Madera*, 484 P.2d 93, 98-99 (Cal. 1971).

¹⁶⁸ *Barner*, 13 P.3d at 710 n.2 (citing *Hunt v. Superior Court*, 987 P.2d 705, 720 (Cal. 1999)).

Consequently, lower courts may not “casually decree governmental immunity” under the rubric of “discretion.”¹⁶⁹ They may reach that result only when the governmental entity has made a “strong showing” that its act was a basic policy decision.¹⁷⁰ Immunity remains the exception; liability the rule.¹⁷¹

III. THE CURRENT STATUS OF GOVERNMENTAL LIABILITY IN FOSTER CARE ABUSE CASES

Although, at one time, a county and its workers could be sued for negligent supervision or placement of a child in foster care, the courts have recently attempted to change the law. California appellate courts, in the last few years, have interpreted the foster care placement statutes so narrowly that direct liability will rarely, if ever, be found. Likewise, derivative liability – once the clearest path to governmental liability – is also now almost impossible to establish. The courts have improperly ignored the policy rationales and legal principles underlying the California Tort Claims Act to grant counties and their social workers absolute immunity.¹⁷² Whether by design or not, these rulings rob foster children of a remedy¹⁷³ for injuries that the legislature intended to be redressed.

A. *Traditional Understandings of Liability In Foster Care Placement and Supervision*

In the years immediately following the enactment of the California Tort Claims Act, governmental liability for negligent foster care placement and supervision was the rule, not the exception. Social workers were not entitled to immunity, because their decisions regarding the maintenance, care, and supervision of dependent children did not constitute basic policy decisions. In

¹⁶⁹ *Johnson*, 447 P.2d at 363.

¹⁷⁰ *Id.*

¹⁷¹ *Ramos*, 484 P.2d at 98 (citing the “well-settled notion that in governmental tort cases, ‘the rule is liability, immunity is the exception’” and stating that “[u]nless the legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail”). The California Supreme Court has never veered from this general rule. *See, e.g., Lopez*, 710 P.2d at 915 (“[I]n governmental tort cases, ‘the rule is liability, immunity is the exception.’”); *Milligan v. City of Laguna Beach*, 670 P.2d 1121, 1123 n.2 (Cal. 1983) (stating that the court’s “decisions since the adoption of the Tort Claims Act of 1963 . . . have adhered to this basic axiom of tort law” that liability is the rule and immunity the exception); *see also Baldwin v. State*, 491 P.2d 1121, 1128-29 (Cal. 1972); *Johnson*, 447 P.2d at 363; *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457, 462 (Cal. 1961).

¹⁷² *See, e.g., Los Angeles County v. Superior Ct. (Terrell R.)*, 125 Cal. Rptr. 2d 637, 640-41 (Ct. App. 2002); *Becerra v. County of Santa Cruz*, 81 Cal. Rptr. 2d 165, 170-71 (Ct. App. 1998).

¹⁷³ *See supra* note 19-21 and accompanying text (discussing the impact of the Court of Appeal cases).

1968, the California Supreme Court, in *Johnson*, held that once the basic policy decision of placing a youth with foster parents has been made,¹⁷⁴ immunity ends and subsequent negligent acts are subject to legal redress.¹⁷⁵ In that case, the state was found liable for failing to warn a foster parent of the homicidal tendencies of the child placed in her home.¹⁷⁶

Although the *Johnson* court did not address the issue directly, the logic of that decision implied that social workers were not entitled to immunity from negligent foster care placement and supervision claims. The *Johnson* court reaffirmed that the Tort Claims Act did not alter the basic teachings of *Muskopf* that a government has a heavy burden and must make a "strong showing" to overcome the presumption against immunity.¹⁷⁷ In *Johnson*, the court held that a parole officer's decision to warn or not to warn foster parents of the child's violent background was "at the lowest ministerial rung of official action,"¹⁷⁸ and the negligent failure to warn constituted "a classic case for the imposition of tort liability."¹⁷⁹ The Court found persuasive that "since the entire populace of California benefits from the activity of the Youth Authority, it should also share equally the burden of injuries negligently inflicted on individual citizens."¹⁸⁰ Suits against the state, the court concluded, "provide a fair and efficient means to distribute . . . losses."¹⁸¹ No reason existed to believe that this analysis did not apply with equal force to social workers.

By 1970, the courts had addressed the issue directly. In *Elton v. County of Orange*,¹⁸² the court of appeal held that social workers were not immune from negligent supervision claims because foster child supervision decisions do not involve making basic policy choices, and therefore are not discretionary acts within the meaning of the statute:

Decisions made with respect to the maintenance, care or supervision of . . . a dependent child, or in connection with her placement in a particular home, may entail the exercise of discretion in a literal sense, but such determinations

¹⁷⁴ *Johnson*, 447 P.2d at 363-64. Subsequent cases have held that the decision to initiate dependency proceedings and remove a child from parental custody is a basic policy decision that confers immunity. *Alicia T. v. County of Los Angeles*, 271 Cal. Rptr. 513, 519-20 (Ct. App. 1990); *Jenkins v. County of Orange*, 260 Cal. Rptr. 645, 647-48 (Ct. App. 1989).

¹⁷⁵ *Johnson*, 447 P.2d at 364 (explaining that "[o]nce the proper authorities have made the basic policy decision—to place a youth with foster parents, for example—the role of section 845.8 immunity ends; subsequent negligent acts, such as the failure to give reasonable warnings to the foster parents actually selected, are subject to legal redress").

¹⁷⁶ *Id.* The California Supreme Court reached a similar conclusion in a related context three years later. *Ramos v. County of Madera*, 484 P.2d 93, 100 (Cal. 1971) ("The authority given counties to implement the basic policy decisions of the legislature as here (and where delegated to the Department of Social Welfare) is purely ministerial.").

¹⁷⁷ *Johnson*, 447 P.2d at 363.

¹⁷⁸ *Id.* at 362.

¹⁷⁹ *Id.* at 363.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² 84 Cal. Rptr. 27 (Ct. App. 1970).

do not achieve the level of basic policy decisions, and thus do not, under the provisions of Government Code section 820.2, preclude judicial inquiry into whether negligence of public employees was involved and whether such negligence caused or contributed to plaintiff's injuries.¹⁸³

In that case, the foster parents allegedly "struck, battered, bruised, scalded, beat[] and physically and mentally forced [the plaintiff] to submit to physical and mental atrocities."¹⁸⁴ The county's alleged negligence was its improper certification of the foster home and its negligent placement of the plaintiff in that home.¹⁸⁵ The *Elton* court held that the initial decision to classify the child as a dependent child and to remove her from her parental home was a basic policy decision to which immunity would attach.¹⁸⁶ But the actual placement of the child in a foster home, the certification, and the administration of the child's care were not planning or policy decisions, and were therefore left unprotected by statutory immunity.¹⁸⁷ The court also found that the foster care statutes imposed mandatory duties.¹⁸⁸

The *Elton* decision and the analytical framework established in *Johnson* were followed throughout the 1970s, 1980s, and early 1990s. Case after case cited *Elton* approvingly, both in and out of the foster care context.¹⁸⁹ Courts concluded that absolute immunity was not available to social workers.¹⁹⁰

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 29.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 30-31.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 31-32; see also *Wood v. County of San Joaquin*, 4 Cal. Rptr. 3d 340, 352 (Ct. App. 2003) (citing *Elton* as an example of how mandatory duties are imposed when a county fails to comply with its own "mandatory state standards of foster home inspection and supervision").

¹⁸⁹ See, e.g., *Scott v. County of Los Angeles*, 32 Cal. Rptr. 2d 643, 651 (Ct. App. 1994) (citing *Elton* and noting that there is no immunity for social workers who are "negligen[t] . . . in the supervision of a minor in foster care"); see also *Morris v. County of Marin*, 559 P.2d 606, 615 (Cal. 1977) (citing *Elton*); *Ramos v. County of Madera*, 484 P.2d 93, 99 (Cal. 1971) (citing and approving of *Elton*); *Wood*, 4 Cal. Rptr. 3d 340, 352 (Ct. App. 2003) (citing *Elton*); *Walt Rankin & Assocs., Inc. v. City of Murrieta*, 101 Cal. Rptr. 2d 48, 66 (Ct. App. 2000) (citing *Elton*); *MacDonald v. State*, 281 Cal. Rptr. 317, 333 (Ct. App. 1991) (citing *Elton*); *Shelton v. City of Westminster*, 188 Cal. Rptr. 205, 210 (Ct. App. 1982) (citing *Elton*). But see *Smith v. Alameda County Soc. Servs. Agency*, 153 Cal. Rptr. 712, 718 (Ct. App. 1979) (distinguishing foster care from other governmental tort claims because the foster care placement statutes were designed to protect the health and safety of dependent children, unlike other statutes).

¹⁹⁰ *MacDonald*, 281 Cal. Rptr. at 326 (noting that foster care placement is unique in the kind and degree of a state and county's inspection duties); *Smith*, 153 Cal. Rptr. at 718 (explaining that foster care placement and supervision is unique). Social workers do, however, enjoy absolute immunity in their decision to investigate child abuse reports and initiate dependency proceedings, but only because of the prosecutorial nature of that decision. See *Alicia T. v. County of Los Angeles*, 271 Cal. Rptr. 513, 519 (Ct. App. 1990) (discussing prosecutorial immunity); *Jenkins v. County of Orange*, 260 Cal. Rptr. 645, 647-48 (Ct. App. 1989) (discussing prosecutorial immunity); cf. *Scott*, 32 Cal. Rptr. 2d at 653 (immunity does not extend to negligence in performance of other social workers' functions).

Supervision of defenseless children, once committed to the custody of the state, is a ministerial or operational act that must be accomplished with reasonable care. In 1984, the California Supreme Court sitting *en banc*, cited *Elton* with approval, characterizing the supervision of children in foster homes as involving ministerial, operational, or "street level" decisions.¹⁹¹ As such, social workers could not enjoy discretionary immunity for negligently placing or supervising foster children.¹⁹² Even as recently as 1994, the court of appeal in *Scott v. County of Los Angeles* held that although social workers may be immunized from liability for their decision to initiate dependency proceedings, "the same immunity does not extend to other functions of social workers."¹⁹³ Foster child supervision consists of only "ministerial" acts.¹⁹⁴

The *Elton* holding—that social workers can be sued for negligent foster child placement and supervision—was not only the law in California, it was the law throughout most of the country.¹⁹⁵ As a New York court observed: "The

of supervising children who are subject of dependency proceedings).

¹⁹¹ *Nunn v. State*, 677 P.2d 846, 849-50 (Cal. 1984) (*en banc*) (characterizing "probation department's negligent placement of dependent child in foster home where she suffered mistreatment and failure to perform state-mandated inspection" as a nondiscretionary operational act); see also *Morris*, 559 P.2d at 615 (citing with approval *Elton* and noting that liability attached because the county failed "to comply with mandatory standards of inspection and supervision dictated by state regulations").

¹⁹² *Nunn*, 677 P.2d at 850.

¹⁹³ *Scott*, 32 Cal. Rptr. 2d at 652 n.12.

¹⁹⁴ *Id.* at 653-54 (noting that there is "no policy reason" to confer immunity to "the separate and distinct functions of supervising the foster care of children who are the subject of dependency proceedings"); cf. *Jordy v. Humboldt*, 14 Cal. Rptr. 2d 553, 559-60 (Ct. App. 1992) (explaining that "a public entity has a duty to prevent physical abuse of children in the custody of the state where it has notice of the abuse," but holding that there is no state duty to provide nonnegligent care for children in foster care, and that therefore a government is not liable merely when the foster parents are negligent).

¹⁹⁵ See, e.g., *Doe v. Jefferson County*, 985 F. Supp. 66, 71 (N.D.N.Y. 1997) (noting that under New York law, the government may be liable for a social worker's negligent supervision, and social workers are not entitled to qualified immunity); *Vonner v. State*, 273 So.2d 252, 255-57 (La. 1972) (finding governmental liability for negligent foster care supervision); *Koepf v. County of York*, 251 N.W.2d 866, 870-71 (Neb. 1977) (citing *Elton* with approval and holding that there is no discretionary act immunity for social workers); *Barnes v. Nassau County*, 487 N.Y.S.2d 827, 830-31 (App. Div. 1985) (citing and approving of *Elton*); *Bartels v. County of Westchester*, 429 N.Y.S.2d 906, 909-10 (App. Div. 1980) (following *Elton*); *Brown Eyes v. South Dakota Dep't of Soc. Servs.*, 630 N.W.2d 501, 506-07 (S.D. 2001) (holding that the "placement and follow-up of children in foster care by social workers is a ministerial function," despite the fact that there may be some discretion involved in a literal sense because social workers are not making policy decisions); *Nat'l Bank of South Dakota v. Leir*, 325 N.W.2d 845, 849-50 (S.D. 1982) (citing *Elton* and finding no discretionary act immunity for negligent supervision claims against social workers because the criteria for placement and standards for follow-up of foster children are already established); *Little v. Utah State Div. of Family Servs.*, 667 P.2d 49, 50-52 (Utah 1983) (following *Elton* reasoning); *Babcock v. State*, 809 P.2d 143 (Wash. 1991) (following *Elton* reasoning); cf. *Edwards v. Dep't of Children & Youth Servs.*, 525 S.E.2d 83, 84-86 (Ga. 2000) (finding that provision of medical care for a child in a youth detention center is nondiscretionary because it does not involve a policy judgment). But see *Pickett v.*

overriding weight of appellate authority in this country is in agreement that a State . . . may be answerable for injuries suffered by children as a result of negligence in the placement or supervision of children in their charge.”¹⁹⁶ As in *Elton*, other state courts concluded that foster child supervision does not involve basic policy decisions, but only ministerial acts.¹⁹⁷ Immunity is therefore not available.

In the mid-1990s, however, California appellate courts began to chip away at what had once been bedrock law. Signs of this change became apparent when the Fourth District Court of Appeal criticized its own earlier decision. In *Ronald S. v. County of San Diego*, the court described *Elton* as a “difficult decision” because it believed foster care placement to be an activity “loaded with subjective determinations.”¹⁹⁸ Nevertheless, the court was careful to note that foster care supervision was unique: “[t]he maintenance of a child in a foster home involves an obligation of continued supervision by the County Much of what the County is obligated to do in terms of continued administration of the child’s welfare undoubtedly constitutes simple and uncomplicated surveillance which reasonably could be characterized as ministerial.”¹⁹⁹ And despite its criticism of *Elton*, the court emphasized that it did not intend to “disapprov[e] or retreat from [its] decision in *Elton*.”²⁰⁰

By the late 1990s, what started as a criticism had turned into attempts to constrain *Elton*’s holding, and then to reject it outright. In 1999, in *Becerra v. County of Santa Cruz*, the court of appeal ostensibly held that although there may be liability for failure to follow specific statutorily mandated procedures, immunity would be the rule, not the exception.²⁰¹ *Becerra* correctly addressed the direct liability analysis to find that the placement statutes required assessment of certain mandatory criteria.²⁰² But *Becerra* then erred when it turned to the issue of derivative liability. Abandoning the holding of *Elton*, and implicitly ignoring the instructions of *Nunn* and *Johnson*, the Court ruled that a social worker’s placement of a foster child was entitled to immunity.²⁰³ Relying on *Ronald S.* – but ignoring its explicit admonitions – the Court reasoned that

Washington County, 572 P.2d 1070 (Or. 1977). For a general discussion of governmental tort liability for a social service agency’s negligence in the supervision of foster children, see Carolyn A. Kubitschek, Annotation, *Social Worker Malpractice for Failure to Protect Foster Children*, 41 AM. JUR. TRIALS 1, § 26 (2003); Sonja A. Soehnel, Annotation, *Governmental Tort Liability for Social Service Agency’s Negligence in Placement, or Supervision After Placement, of Children*, 90 A.L.R. 3d 1214 (1979).

¹⁹⁶ *Barnes*, 487 N.Y.S.2d at 830.

¹⁹⁷ See *supra* note 195.

¹⁹⁸ 20 Cal. Rptr. 2d 418, 424-25 (Ct. App. 1993).

¹⁹⁹ *Id.* at 425.

²⁰⁰ *Id.*

²⁰¹ 81 Cal. Rptr. 2d 165, 170-74 (Ct. App. 1998).

²⁰² *Id.* at 170 (finding that the mandatory duty “imposed upon the County by section 16501.1, subdivision (c) . . . is to evaluate the stated criteria prior to making a placement selection”).

²⁰³ *Id.* at 172-74.

because social workers exercise discretion in making placement decisions, the government is shielded from liability:

Selecting and certifying a foster [family] home for care of dependent children seems to us to be an activity loaded with subjective determinations and fraught with major possibilities of an erroneous decision. It appears to us that foster [family] home placement . . . constitutes an activity of a co-equal branch of government, and that the discretionary decisions made in connection therewith should be deemed beyond the proper scope of court review.²⁰⁴

In short, the *Becerra* court improperly applied the prohibited literal definition of “discretionary” and found that because “social workers engage in a discretionary analysis of the needs and interests of a dependent child, immunity exists.”²⁰⁵

Then, in 2002, the court of appeal completely rejected the holdings of *Elton*. The court of appeal multiplied the mistakes of *Becerra* to not only reaffirm *Becerra*’s faulty derivative liability analysis – de facto immunizing counties from all derivative liability – but also to eliminate any direct liability exposure. By doing so, the appeals court turned thirty years of precedent on its head.

B. *The Illegitimate Move To Absolute Governmental Immunity*

In September 2002, the Second District Court of Appeal decided *County of Los Angeles v. Superior Court (In re Terrell R.)*.²⁰⁶ That case, in dramatic terms, reimposed absolute governmental immunity in the context of derivative claims for negligent foster child placement and supervision. Moreover, its holding, if followed by other courts, would render most direct liability claims unviable.

The facts of the *Terrell R.* case are not unusual for a foster care abuse case. In 1999, the County Department of Children and Family Services removed Terrell, an eleven-year-old, and his siblings, from the custody of their grandmother.²⁰⁷ The children were removed because the grandmother was unable to provide for them and was allegedly abusing prescription drugs.²⁰⁸ A state-licensed foster family agency certified a family friend, Robert Poole, as a foster parent.²⁰⁹ Poole, however, had completed only fifteen of the thirty hours of training that the agency required for certification.²¹⁰ Moreover, a “child abuse index clearance, the results of a TB test, and verification of employment

²⁰⁴ *Id.* at 173 (quoting *Ronald S. v. County of San Diego*, 20 Cal. Rptr. 2d 418, 425 (Ct. App. 1993)).

²⁰⁵ *Id.*

²⁰⁶ 125 Cal. Rptr. 2d 637 (Ct. App. 2002).

²⁰⁷ *Id.* at 641.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

had not been completed prior to the certification.”²¹¹ Despite the County social worker’s awareness that Poole had not completed the requirements for certification, and that Terrell would not be with his siblings or other relatives, Terrell was placed in Poole’s home.²¹²

Poole’s home was not an appropriate placement.²¹³ Although Terrell had his own bedroom, he slept in the same bed as Poole.²¹⁴ Poole allegedly repeatedly sexually molested and abused Terrell over several months.²¹⁵ The County social worker was unaware of what was happening because she did not visit Terrell at Poole’s home during his placement.²¹⁶

Terrell sued the County and others, asserting causes of action under the Tort Claims Act.²¹⁷ Terrell alleged that his placement in the Poole home violated several mandatory duties.²¹⁸ The alleged mandatory duty violations, included, among other things: (1) placing Terrell in an uncertified home; (2) failing to monitor Terrell’s condition and visit him regularly at his home; and (3) failing to place Terrell with relatives and his siblings.²¹⁹ He also alleged that his supervision after placement was negligent.²²⁰ The county moved for summary judgment.²²¹ It argued that it was immune from suit for two reasons. The county claimed it breached no mandatory duties that proximately caused any injury to Terrell.²²² The county also urged that any negligence was the result of the social worker’s exercise of discretion, and therefore the County was also immune on any derivative liability claim.²²³ The trial court denied the County’s summary judgment motion and a writ of mandate was filed.²²⁴

In writ proceedings, the Court of Appeal ordered the trial court to grant summary judgment in the County’s favor.²²⁵ The Court of Appeal granted the writ on two grounds. The court first found there could be no direct liability. According to the court, “foster care placement [and supervision] is a governmental function that involves the exercise of discretion” and the obligatory language of the foster care statutes are “merely [statements of] a

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 642.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* Terrell initially sued Robert Poole, Monica Poole, the County, Wings of Refuge, and Dependency Court Legal Services. The *Terrell R.* decision focused only on the issue of whether the County could be held liable.

²¹⁸ *Id.* at 642, 645.

²¹⁹ *Id.* at 645-48.

²²⁰ *Id.* at 649.

²²¹ *Id.* at 642-43.

²²² *Id.* at 642.

²²³ *Id.* at 643.

²²⁴ *Id.*

²²⁵ *Id.* at 650.

legislative goal or policy.”²²⁶ More controversially, the court concluded that the purpose of the statutes and regulations regarding foster care placement is not to prevent sexual abuse.²²⁷ Instead, the court found that the statutes’ purpose is to encourage family reunification.²²⁸ Therefore, no mandatory duties were imposed by the foster care placement statutes, and the County was not directly liable as a matter of law.²²⁹ Second, the court held that the County could not be derivatively liable.²³⁰ The court ruled that discretionary act immunity applied because social workers had choices on how to supervise and place children.²³¹ The court agreed that “selecting and certifying a foster [family] home for care of dependent children [is] . . . an activity loaded with subjective determinations . . . and that the discretionary decisions made in connection therewith should be deemed beyond the proper scope of court review.”²³² On December 18, 2002, the California Supreme Court denied review and denied a request for depublication.²³³

C. *Judicial Missteps: Why Los Angeles County v. Superior Court (Terrell R.) Got It Wrong*

The Court of Appeal’s broad pronouncements in *Terrell R.* were misguided, and the legal reasoning used to make those pronouncements was fundamentally unprincipled. First, the court’s direct liability analysis was fraught with errors. It initially erred by ruling that the statutory provisions governing foster care placement impose no mandatory duties.²³⁴ The court compounded that error by holding that the purpose of the child welfare statutes is not to protect children from abuse.²³⁵ The court reached these conclusions—representing a significant departure from prior precedent—even though the text, the legislative history, and the government’s own interpretation of the statutory provisions governing foster care placement all support the opposite conclusion. Second, the court erred in its derivative liability analysis. By ignoring binding Supreme Court precedent, the court reached the unfounded conclusion that a social worker is entitled to discretionary act immunity even for negligently making operational, non-policy based decisions.²³⁶

²²⁶ *Id.* at 645-48.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 648-50.

²³⁰ *Id.*

²³¹ *Id.* at 644-46.

²³² *Id.* at 649 (quoting *Becerra v. County of Santa Cruz*, 81 Cal. Rptr. 2d 165, 172-74 (Ct. App. 1998)).

²³³ A rehearing was denied on October 18, 2002. Review and a request for depublication was denied on December 18, 2002.

²³⁴ *Terrell R.*, 125 Cal. Rptr. 2d at 645-48.

²³⁵ *Id.*

²³⁶ Although this Article criticizes the Court of Appeal’s analysis and interpretation of the

1. *The statutes governing foster care placement impose mandatory duties.*

The court's holding that the statutory provisions governing foster care placement do not impose mandatory duties as a matter of law²³⁷ ignores established principles of statutory construction. A court must first turn to the language of the statute and give the words their ordinary meaning.²³⁸ If the words of the statute are unambiguous, courts are compelled to apply their plain meaning,²³⁹ unless doing so would result in an absurdity²⁴⁰ or frustrate the statute's manifest purpose.²⁴¹ If the court finds the statutory language ambiguous, it should then turn to extrinsic evidence, such as legislative history, to determine legislative intent.²⁴² The *Terrell R.* court engaged in none of this analysis.

The conclusion that the child welfare statutes only set legislative goals and policies, and do not impose mandatory duties, is inconsistent with the statutory text. The child welfare statutes at issue in *Terrell R.* use mandatory, not

Tort Claims Act, the Article does not intend to comment on the ultimate outcome based on the facts of that case. It may well be that even if the court had correctly applied the Tort Claims Act, no liability would have been found if the case had gone to trial. From the court's description of what happened, it is unclear that the social worker's negligence caused Terrell's injuries or that sufficient warning signs existed such that a reasonable social worker would have been on notice that the Poole home was an inappropriate placement.

²³⁷ *Terrell R.*, 125 Cal. Rptr. 2d at 640-42.

²³⁸ CAL. CIV. PROC. CODE § 1858 (West Supp. 2004) ("[I]n the construction of a statute . . . the Judge is simply to ascertain and declare what is in terms or in substance contained therein . . ."); *People v. Rubalcava*, 1 P.3d 52, 56 (Cal. 2000); *see also* *People v. Birkett*, 980 P.2d 912, 915 (Cal. 1999) ("[W]e turn first to the language of the statute, giving the words their ordinary meaning.").

²³⁹ *Lungren v. Deukmejian*, 755 P.2d 299, 303-04 (Cal. 1988) (explaining that when statutory language is unambiguous, a court need not rely on other indicia of legislative intent); *In re Lance W.*, 694 P.2d 744, 752 (Cal. 1985) (explaining that a court may not go beyond plain unambiguous language of statute); *J.A. Jones Constr. Co. v. Superior Court*, 33 Cal. Rptr. 2d 206, 210 (Ct. App. 1984) (explaining that where the text of a statute is clear, a court should not inquire into legislative intent).

²⁴⁰ *People v. Jenkins*, 893 P.2d 1224, 1231 (Cal. 1995); *People v. Broussard*, 856 P.2d 1134, 1136 (Cal. 1993) (quoting *Younger v. Superior Court*, 577 P.2d 1014 (Cal. 1978)).

²⁴¹ *See generally* Russell Holder, Comment, *Say What You Mean and Mean What You Say: The Resurrection of Plain Meaning in California Courts*, 30 U.C. DAVIS L. REV. 569, 572-74 (1997).

²⁴² CAL. CIV. PROC. CODE § 1859 (West 1983) (requiring that courts pursue the intent of the legislature when construing a statute); *see also* *People v. Woodhead*, 741 P.2d 154, 156 (Cal. 1987) (finding that if the language permits more than one reasonable interpretation, then the court must look "to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part"); *Nunn v. State*, 677 P.2d 846, 851 (Cal. 1984) (en banc) ("[W]hen the specific language does not shed light as to the intent of the legislature, it can be determined from other factors."); *Friends of Mammoth v. Bd. of Supervisors*, 502 P.2d 1049, 1056 (Cal. 1972) (finding that courts may use "extrinsic aids" besides legislators' statements to determine intent).

discretionary, language.²⁴³ The word “shall” appears repeatedly in the statutes.²⁴⁴ The plain language of the statutes at issue in *Terrell R.* makes clear that the social workers have mandatory duties including:

- placing the dependent child, if possible and safe to do so, in the home of a relative rather than a foster home;²⁴⁵
- taking diligent steps to locate an appropriate relative,²⁴⁶ and evaluating all relatives for their appropriateness, before placing a child in long-term foster care;²⁴⁷
- providing family reunification services for all foster children;²⁴⁸
- selecting foster homes, based on whether the home is safe, most family-like, and in close proximity to the child’s biological parent’s home, rather than selecting homes based on other considerations;²⁴⁹

²⁴³ See *supra* note 140.

²⁴⁴ See, e.g., CAL. FAM. CODE § 7950(a)(1) (West Supp. 2004) (requiring that certain considerations “shall be used,” that “[p]lacement *shall*, if possible, be made in the home of a relative,” that “diligent efforts *shall* be made to locate an appropriate relative,” and that “[b]efore any child may be placed in long-term foster care, [relatives] *shall be evaluated* as an appropriate placement resource”) (emphasis added); CAL. WELF. & INST. CODE § 16000 (“Family reunification services *shall be provided* . . . as required by law”) (emphasis added); *Id.* § 16501.1(c) (“[T]he decision regarding choice of placement *shall be* based upon selection of a safe setting . . .”) (emphasis added); CAL. DEP’T OF SOC. SERVS., DSS MANUAL OF POLICIES AND PROCEDURES reg. 31-420.2 (1992) [hereinafter DSS MANUAL] (requiring a social worker to adhere to certain priorities in foster care placement).

²⁴⁵ CAL. FAM. CODE § 7950(a)(1) (“Placement *shall*, if possible, be made in the home of a relative, unless the placement would not be in the best interest of the child.”) (emphasis added).

²⁴⁶ *Id.* (“Diligent efforts *shall be* made . . . to locate an appropriate relative.”) (emphasis added).

²⁴⁷ *Id.* (“Before any child may be placed in long-term foster care, the court shall find that the agency or entity to which this subdivision applies has made diligent efforts to locate an appropriate relative and that each relative whose name has been submitted to the agency or entity as a possible caretaker, either by himself or herself or by other persons, has been evaluated as an appropriate placement resource.”).

²⁴⁸ CAL. WELF. & INST. CODE § 16000 (“Family reunification services *shall be* provided for expeditious reunification of the child with his or her family, as required by law.”) (emphasis added).

²⁴⁹ *Id.* § 16501.1(c) (“If out-of-home placement is used to attain case plan goals, the decision regarding choice of placement *shall be* based upon selection of a safe setting that is the least restrictive or most familylike [sic] and the most appropriate setting that is available and in close proximity to the parent’s home, consistent with the selection of the environment best suited to meet the child’s special needs and best interest, or both. The section *shall* consider, in order of priority, placement with relatives, tribal members, and foster family, group care, and residential treatment pursuant to Section 7950 of the Family Code.”) (emphasis added); see also DSS MANUAL, *supra* note 244, reg. 31-420.2 (1992) (requiring a priority of relatives, foster family, and licensed group home).

- placing dependent children only in certified family homes, when a foster home placement is necessary;²⁵⁰ and
- visiting the foster child monthly,²⁵¹ but at least three times in the first thirty days after placement.²⁵²

Supporting the conclusion that mandatory duties exist in the child welfare statutes is evidence of what the Legislature did not do. If the Legislature had intended to exclude the child welfare statutes from the purview of the Tort Claims Act, it would have said so expressly.²⁵³ When the legislature has intended the word “shall” not to create a mandatory duty, it has been explicit.²⁵⁴

If the obligatory, statutory language—the most important guide in determining legislative intent²⁵⁵—was not dispositive, as the court apparently believed, the court was required “to point to other factors [to] indicate that [the] apparent obligatory language was not intended to foreclose” an exercise of discretion.²⁵⁶ But the court provided no reason why the plain obligatory language did not mean what it said.²⁵⁷ Nor did it cite, or could it cite, to any authority or legislative history to support its contrary interpretation.²⁵⁸ It could not do so, because the authority uniformly contradicts the court’s holding.²⁵⁹ Every decision prior to *Terrell R.* agreed that the child welfare statutes impose some mandatory duties, at least to evaluate certain criteria in making placement

²⁵⁰ DSS MANUAL, *supra* note 244, reg. 31-420.22 (permitting placement in a “licensed foster family home, licensed small family home, or a licensed foster family agency for placement in a family home *which has been certified by the foster family agency*”) (emphasis added).

²⁵¹ CAL. WELF. & INST. CODE § 16516.5(a) (requiring that foster children placed in group homes “shall be visited at least monthly by a county social worker or probation officer” and that “[e]ach visit shall include a private discussion between the foster child and the county social worker or probation officer”); DSS MANUAL, *supra* note 244, reg. 31-320.41.

²⁵² DSS MANUAL, *supra* note 244, reg. 31-320.2.

²⁵³ See *supra* note 140 (explaining that mandatory duties exist only when the Legislature uses mandatory language).

²⁵⁴ See, e.g., CAL. CIV. CODE § 43.99(d) (noting that “[n]othing in this section shall be construed to alter immunity of employee of the Department of Housing and Community Development under the Tort Claims Act”); CAL. PENAL CODE § 12076(k) (deeming the Department of Justice’s acts, as they pertain to firearms, to be discretionary within the meaning of the Tort Claims Act); *Id.* § 12084(e) (deeming action under this section “to be a discretionary act under the meaning of the California Tort Claims Act”).

²⁵⁵ *Morris v. County of Marin*, 559 P.2d 606, 612 n.6 (Cal. 1977); see also *Haggis v. City of Los Angeles*, 993 P.2d 983, 987 (Cal. 2000) (quoting *Morris* and noting that statutory language is a most important guide to determining legislative intent); *In re Sergio R.*, 131 Cal. Rptr. 2d 160, 164 (Ct. App. 2003) (quoting *Haggis*).

²⁵⁶ *Morris*, 559 P.2d at 612 n.6; see also *supra* notes 140-143 and accompanying text.

²⁵⁷ *Terrell R.*, 125 Cal. Rptr. 2d at 640-48.

²⁵⁸ *Id.*

²⁵⁹ See generally *Morris*, 559 P.2d at 612 n.6 (finding the use of the word “shall” to be clear statutory language and that therefore there could be no question that the provision imposed a mandatory duty); *Elson v. Pub. Utils. Comm’n*, 124 Cal. Rptr. 305, 307-08 (Ct. App. 1975) (finding that a mandatory duty was clearly involved when the statute used obligatory language).

and supervision choices.²⁶⁰ Moreover, case law in other contexts, decided under section 815.6, has held that comparable statutory language imposed mandatory duties.²⁶¹

In fact, even the social service agency's own interpretation of the statutes is contrary to the court's conclusion. The Department of Health and Human Services, which periodically reviews the Juvenile Justice System in California, recognizes that the dependency laws impose mandatory duties on social workers, such as maintaining a case plan, periodically visiting the foster child, and holding permanency hearings within set time periods.²⁶² Moreover, common sense favors finding that the statutes impose mandatory duties. If the criteria and other requirements set forth in the foster care placement statutes may be simply disregarded, what was the purpose of their enumeration by the legislature? The California Legislature agrees. In response to the *Terrell R.* decision, the Legislature amended the Welfare and Institutions Code to reaffirm that the state has a "duty to comply" with the federal law requirements (such as maintaining case plans, holding periodic reviews and timely permanency hearings) relevant to the protection and welfare of foster care children.²⁶³

The court attempted to justify ignoring the statutory language, prior precedent, and the agency's interpretation of its own regulations, by stating that because "foster care placement is a governmental function that involves the exercise of discretion," mandatory duties could not exist.²⁶⁴ But this is no justification at all. That a statute imposes discretion in one area (in this case, the policy decision that an abused child should be removed from parental custody and placed in foster care), does not mean that the statute does not impose mandatory requirements on how that discretion may be used in other areas

²⁶⁰ See, e.g., *Becerra v. County of Santa Cruz*, 81 Cal. Rptr. 2d 165, 170 (Ct. App. 1998) (holding that statutes, such as section 16501.1, created a mandatory duty to "evaluate stated criteria" in making a placement selection); see also *Scott v. County of Los Angeles*, 32 Cal. Rptr. 2d 643, 646 (Ct. App. 1994); *Elton v. County of Orange*, 84 Cal. Rptr. 27 (Ct. App. 1970). Admittedly, the *Terrell R.* court paid lip service to *Becerra*. But after noting that earlier decisions found that mandatory duties exist, *Terrell R.* reached the inconsistent result that section 16501.1, despite the holding in *Becerra*, created no mandatory duties. *Terrell R.*, 125 Cal. Rptr. 2d at 646-47.

²⁶¹ Compare *Davila v. County of Los Angeles*, 57 Cal. Rptr. 2d 651, 653 (Ct. App. 1996) (finding statutory language stating that when a coroner takes a dead body, the coroner "shall make a reasonable attempt to locate the family" imposes a mandatory duty to make a "reasonable attempt") with CAL. FAM. CODE § 7950 (West Supp. 2004) (requiring that "[d]iligent efforts shall be made to locate an appropriate relative").

²⁶² See 2000 AUDIT OF PROTECTIONS, *supra* note 4, at i ("[C]ertain protections are mandated for each foster care child under State supervision"); *id.* at 4 ("The objectives of our audit were to determine if the: (i) *mandatory foster care protections* consisting of the case plan, periodic reviews, and permanency hearings were provided . . .") (emphasis added).

²⁶³ CAL. WELF. & INST. CODE § 16000.1 ("It is the intent of the Legislature to confirm the state's duty to comply with all requirements under Part B of Title IV of the Social Security Act (42 U.S.C. § 620 *et seq.*) and Part E of Title IV of the Social Security Act (42 U.S.C. § 670 *et seq.*) that are relevant to the protection and welfare of children in foster care.").

²⁶⁴ *Terrell R.*, 125 Cal. Rptr. 2d at 646.

(here, placement and supervision).²⁶⁵ Even though the ultimate placement decision may be left to some degree to the social worker's discretion, a social worker is still required to evaluate and adhere to certain criteria in making that decision.²⁶⁶

2. *A fundamental purpose of the child welfare statutes is to prevent child abuse.*

The Court of Appeal's conclusion that the child welfare statutes imposed only nonobligatory duties was unprecedented. Even more controversial, however, was the court's conclusion—made without analysis or citation to authority²⁶⁷—that the purpose of statutes governing foster care placement “is to preserve the family relationship, not to prevent sexual abuse.”²⁶⁸ As an initial matter, it is curious how the court was able to divine statutory purpose, without analyzing or referring to the statute's text, its legislative history, case precedent or any other authority.²⁶⁹ But putting aside these obvious criticisms, the court's conclusion is flawed for more fundamental reasons.

While it is true that a purpose of the child welfare statutes is “to preserve the family relationship” when possible,²⁷⁰ the paramount concern of the foster care system is the prevention of child abuse.²⁷¹ This conclusion logically

²⁶⁵ A long line of cases holds that even if a statute does not impose a mandatory duty to take a specified action, a mandatory duty may exist to investigate or fulfill certain criteria in making that decision. *See, e.g., Brennenman v. State*, 256 Cal. Rptr. 363, 366 (Ct. App. 1989) (holding that statute did not impose mandatory duty to take action, but did impose a mandatory duty to investigate); *State v. Superior Court (Perry)*, 197 Cal. Rptr. 914, 922-23 (Ct. App. 1984) (explaining that real estate commissioner had a mandatory duty to investigate complaints of wrongdoing, but that the statute did not impose mandatory duty to take action in event of wrongdoing). *See generally* CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, *supra* note 150, § 9.32 (explaining that although a statutory provision may create a mandatory duty in one area (e.g., to investigate), the statute may not create a mandatory duty in another (e.g., to act)).

²⁶⁶ *See, e.g., Becerra v. County of Santa Cruz*, 81 Cal. Rptr. 2d 165, 170 (Ct. App. 1998); *Elton v. County of Orange*, 84 Cal. Rptr. 27, 30-31 (Ct. App. 1970); *cf. Wood v. County of San Joaquin*, 4 Cal. Rptr. 3d 340, 351 (Ct. App. 2003) (relying on *Elton* and citing foster care as situation in which mandatory duties exist).

²⁶⁷ *Terrell R.*, 125 Cal. Rptr. 2d at 646-47.

²⁶⁸ *Id.* (interpreting the purpose of section 7950 of the California Family Code; sections 16000, 16002(b), and 16501.1(c) of the California Welfare and Institutions Code; and regulations 31-420.2, 31-405.1(j), and 31-420.1 of the California Department of Social Services's *Manual of Policies and Procedures*).

²⁶⁹ *Cf. CAL. CIV. PROC. CODE* § 1859 (West Supp. 2004) (mandating that in construing a statute the intention of the legislature is to be pursued). *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 (1990) (discussing and explaining various theories of statutory interpretation and concluding that courts consider a “broad range of textual, historical, and evolutive evidence when it interprets statutes”).

²⁷⁰ *Terrell R.*, 125 Cal. Rptr. 2d at 646-47.

²⁷¹ *See, e.g., FINAL REPORT*, *supra* note 3, at 4 (stating the priority that “[c]hildren are, first

follows because the state *only* has the right to remove a child from a parents' custody when compelling circumstances, such as abuse or neglect, compel that removal.²⁷² The state likewise may only return a child to his or her parents' custody when it is safe to do so.²⁷³ The majority of minors who are placed in the foster care system are placed because of evidence of parental abuse.²⁷⁴ Similarly, the reason behind placing a child in a relative's home,²⁷⁵ or keeping siblings together, is the belief that the preservation of family ties, when safe to do so, best protects a child's welfare.²⁷⁶ Hence, contrary to the court's holding,

and foremost, protected from abuse and neglect"); David J. Herring, *The Adoption and Safe Families Act—Hope and Its Subversion*, 34 FAM. L.Q. 329, 329 (2000) (stating that Congress was clear, in passing the Adoption and Safe Families Act, that the paramount goal for public welfare systems is to secure the health and safety of children within the systems); see also Dorothy E. Roberts, *Is There Justice in Children's Rights? The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112 (1999) (stating that Congress's intent in recent legislation was to make health and safety of children in foster care the top priority).

²⁷² See, e.g., CAL. WELF. & INST. CODE § 361(c) (permitting removal if, among other circumstances, there is a "substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor" or the minor has been "sexually abused" and "there are no reasonable means by which the minor can be protected from further sexual abuse . . . without removing the minor from his or her parent of guardian"); *Id.* § 16501 (West 2001) (explaining that child welfare services include services directed toward, among other things: (a) protection and promotion of the welfare of all children; (b) prevention or remedying of child neglect, abuse, exploitation, or delinquency; (c) prevention of unnecessary separation of children from families by identification of and assistance in resolving family problems; and (d) restoration to families of children previously removed); see also *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (stating that natural parents have a fundamental liberty interest in the care, custody, and management of their child, even if the state has temporarily taken custody of that child); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (stating that a state needs a "powerful countervailing interest" to interfere with a parent's right to her child's companionship).

²⁷³ CAL. WELF. & INST. CODE § 361.5 (West Supp. 2004) (requiring no reunification, among other things, when (1) the parent/guardian has caused the death of a child by abuse or neglect; (2) the child was adjudicated a dependent as a result of severe sexual or physical abuse, and the court factually finds that reunification would not be in the child's best interests; (3) the child has been twice removed from the same home because of abuse or neglect; or (4) the parents sexually molested the child).

²⁷⁴ Nationwide, more than fifty percent of children placed in foster care are removed from their family homes because they suffered parental abuse. See STAFF OF HOUSE COMM. ON WAYS AND MEANS, 103D CONG., 1994 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 651 (Comm. Print 1994) (stating that more than 50% of children placed in substitute care were separated from their parents specifically for protection, while an additional 20.9% were removed because the parent was absent or unfit); see also Brendan P. Kearsse, *Abused Again: Competing Constitutional Standards for the State's Duty to Protect Foster Children*, 29 COLUM. J.L. & SOC. PROBS. 385, 385 (1996).

²⁷⁵ See CAL. FAM. CODE § 7950 (requiring placement "in the home of a relative, unless the placement would not be in the best interest of the child").

²⁷⁶ Jim Moye, *City Hall Can Be Beaten: Litigation Strategies for Child and Family Advocates Under the Adoption and Safe Families Act of 1997*, 4 J.L. & FAM. STUDIES 303, 305-06 (2002) (noting studies where children placed in foster care fared significantly worse than those left in the care of biological parents able to care for them).

the child welfare statutes and the foster care system are designed specifically to protect children from abuse by temporarily removing them from their abusive homes.²⁷⁷

Additionally, the court's ruling is difficult, if not impossible, to square with the statutes' plain language, which speaks directly to ensuring that the County places children in safe homes and looks after their best interests.²⁷⁸ To provide just a few examples, section 300.2 of the Welfare and Institutions Code states that the purpose of the dependency laws is "to provide *maximum safety and protection for children* who are currently [being abused] . . . and to *ensure the safety, protection, and physical and emotional well-being of children* who are at risk of that harm."²⁷⁹ Section 16501.1 of the Welfare and Institutions Code explains that the foster care system was "designed to provide time-limited protective services to *prevent or remedy neglect, abuse or exploitation*, for the purposes of preventing separation of children from their families."²⁸⁰ Numerous other provisions use similar language.²⁸¹ Indeed, since *Terrell R.*, the Legislature enacted section 16000.1 of the Welfare and Institution Code to clarify that "the *state has a duty* to care for and protect the children that the state places into foster care, and as a matter of public policy, the *state assumes an obligation of the highest order to ensure the safety of children in foster*

²⁷⁷ CAL. WELF. & INST. CODE § 300.2; *see also In re Santos Y.*, 112 Cal. Rptr. 2d 692, 727 (2001) (explaining that the three primary goals of the dependency statutes are to: (1) protect the child; (2) preserve the family and safeguard the parents' fundamental right to raise their child, as long as these can be accomplished with the child being safe; and (3) provide a stable, permanent home for the child); *Jordy v. County of Humboldt*, 14 Cal. Rptr. 2d 553, 558 (Ct. App. 1992) (stating that juvenile court law was enacted to prevent specific evils of intentional abuse and systemic neglect); *Hansen v. Dep't of Soc. Servs.*, 238 Cal. Rptr. 232, 236 (Ct. App. 1987) (explaining that child welfare services are intended to protect children from abuse); *cf. Alejo v. City of Alhambra*, 89 Cal. Rptr. 2d 768, 774 (Ct. App. 1999) (finding that "the mandatory duty to investigate and report accounts of child abuse was intended to 'protect children from child abuse'").

²⁷⁸ *See, e.g.,* CAL. FAM. CODE § 7950 (permitting placement with relatives only when in the "child's best interest" and after evaluation "as an appropriate placement resource"); CAL. WELF. & INST. CODE § 16500 (West 2001) (declaring legislative intent that under the Public Child Welfare Service Act "all children are entitled to be safe and free from abuse and neglect"); *Id.* § 16501.1 (West Supp. 2004) (explaining that placement shall be based upon "selection of a safe setting" "best suited to meet the child's special needs and best interests").

²⁷⁹ CAL. WELF. & INST. CODE § 300.2 (emphasis added).

²⁸⁰ *Id.* § 16501.1(b) (emphasis added).

²⁸¹ *See, e.g., id.* § 300.2 (stating that purpose of dependency statutes is "to provide maximum safety and protection for children"); *id.* § 361.3 (stating that placement with relatives requires evaluation of whether the relative can provide a "safe, secure, and stable environment" for the child); *id.* § 16001.9 (West Supp. 2004) (stating that children in foster care have the right to be "free from physical, sexual, emotional, or other abuse"); *id.* § 16500 (West 2001) (stating that "all children are entitled to be safe and free from abuse and neglect"); *id.* § 16501.1(b) (West Supp. 2004) (requiring case plans "to ensure that the child receives protection and safe and proper care"); *id.* § 16501.1(c) (requiring that placement decisions be based on a selection of a "safe setting"); *id.* § 16501.15 (defining "safe" under section 16501.1 to mean that the "home or setting is free from abuse or neglect").

care.”²⁸²

Case precedent interpreting these statutes also supports the conclusion that one of the purposes of the child welfare statutes is to prevent abuse.²⁸³ As one court has explained, the foster care statutes impose a duty of supervision on social workers that “was clearly designed to protect” against child abuse.²⁸⁴ Moreover, there is a “direct and rationally deducible connection between the agency’s negligent placement of a child in an inappropriate foster home and the injury to the child.”²⁸⁵

Legislative history also runs contrary to the court’s findings. Much of California’s foster care regulations are based on federal legislation.²⁸⁶ In 1980, Congress enacted the Adoption Assistance and Child Welfare Act,²⁸⁷ which California adopted in 1982.²⁸⁸ That legislation sought to deemphasize the use of foster care and to promote other means of remedying child abuse and neglect while preserving families.²⁸⁹ It required welfare agencies to make reasonable efforts to maintain children with their families, and if that was not possible, to reunify children with their families as soon as it was safe to do so.²⁹⁰ Although family preservation or family reunification was a key component of the 1980 legislation, child safety was still of paramount concern.²⁹¹ If, however, there was any doubt that the overall purpose of the child welfare laws was to prevent abuse, that doubt was erased in 1997.

²⁸² *Id.* § 16000.1 (emphasis added).

²⁸³ See, e.g., *Hansen v. Dep’t of Soc. Servs.*, 238 Cal. Rptr. 232, 236 (Ct. App. 1987) (discussing section 16501 and explaining that one of its purposes is to prevent or remedy the neglect, abuse, and exploitation of children); *Smith v. Alameda County Soc. Servs. Agency*, 153 Cal. Rptr. 712, 718 (Ct. App. 1979) (noting that foster care placement statutes, as contrasted with certain adoption statutes, were “designed to protect the health and safety of dependent children . . .”); cf. *Jordy v. County of Humboldt*, 14 Cal. Rptr. 2d 553, 560 (Ct. App. 1992) (finding that a “public entity has a duty to prevent physical abuse of children in the custody of the state where it has notice of the abuse”).

²⁸⁴ *Shelton v. City of Westminster*, 188 Cal. Rptr. 205, 210 (Ct. App. 1982) (emphasis omitted).

²⁸⁵ *Id.*

²⁸⁶ FOSTER, *supra* note 5, at 43-47 (describing major legislative milestones affecting California’s foster care system).

²⁸⁷ Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C.).

²⁸⁸ California’s system was revised to conform to the federal Adoption Assistance and Child Welfare Act in 1982. Act of Sep. 12, 1982, ch. 978, 1982 Cal. Stat. 3525; see also FOSTER, *supra* note 5, at 43-47.

²⁸⁹ S. REP. NO. 96-336, at 1 (1979).

²⁹⁰ Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 223-25 (1990) (examining the legislative history of the Adoption Assistance and Child Welfare Act of 1980); see also Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem that Too Many Children Are Not Being Adopted Out of Foster Care or that Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141, 141-43 (1999).

²⁹¹ Shotton, *supra* note 290, at 230-33; see also CAL. WELF. & INST. CODE § 361.54 (West Supp. 2004) (providing exceptions to reunification in cases of likely abuse).

In 1997, Congress enacted the Adoption and Safe Families Act,²⁹² which California implemented in 1998.²⁹³ In that Act, Congress amended the Child Welfare Act to explicitly state that the "paramount goal for public child welfare systems is to secure the health and safety of the children who enter" the welfare system.²⁹⁴ The Act thus "prioritize[d] child health and safety over family preservation."²⁹⁵ Indicative of Congress' move away from family reunification were the Act's requirements that states terminate parental rights for children who have been in foster care for fifteen of the past twenty-two months.²⁹⁶ The Act also significantly shortened the timeframe in which reunification could occur,²⁹⁷ requiring a permanency hearing within twelve months after a child is placed in foster care.²⁹⁸ Finally, states were relieved of their efforts to reunify the child with their family, if a court determined that a parent has: (a) murdered one of their children; (b) committed involuntary manslaughter of one of their children; (c) conspired to commit murder or involuntary manslaughter against one of their children; (d) committed a felony assault resulting in serious bodily injury to the child or the other parent; or (e) had their parental right's involuntarily terminated for one of their other children.²⁹⁹ Several commentators even criticized Congress for overly emphasizing child health and safety and for dictating aggressive permanency planning, rather than promoting family reunification.³⁰⁰ In light of this 1997 legislation, Congress and the

²⁹² Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

²⁹³ Act of Sept. 30, 1998, ch. 1056, 1998 Cal. Stat. (implementing the provisions of the federal Adoptions and Safe Families Act in California); *see also* FOSTER, *supra* note 5, at 45-46 (describing the California's foster care legislation history).

²⁹⁴ 42 U.S.C. § 671(a)(15)(A) (2000) ("[T]he child's health and safety shall be the paramount concern."); *see also* FOSTER, *supra* note 5, at 35 ("Significant changes in federal and state laws and policy reflect a re-emphasis of child safety over family preservation."); Herring, *supra* note 271, at 330 (noting the emphasis in federal law on child safety); Roberts, *supra* note 271, at 113 ("ASFA amends the 1980 Act to direct state authorities to make the health and safety of children in foster care their top priority."); *Developments in the Law—Unified Family Courts and the Child Protection Dilemma*, 116 HARV. L. REV. 2099, 2114-115 (2003) (tracing the history of the ASFA and noting that "[w]hat emerged was the family law's version of the absolute priority rule: while families' and parents' interests and rights remained important, children's health and safety became the 'paramount concern' of the child welfare system").

²⁹⁵ FOSTER, *supra* note 5, at 45.

²⁹⁶ 45 C.F.R. § 1356.21(i) (2003); *see* CAL. WELF. & INST. CODE § 727.32 (West Supp. 2004); CAL. R. CT. 1496.3.

²⁹⁷ 42 U.S.C. § 672(5).

²⁹⁸ 42 U.S.C. § 1320a-9; CAL. WELF. & INST. CODE § 727.3; *id.* § 11404.1 (West 2001).

²⁹⁹ Moyer, *supra* note 276, at 306-07; *see also* 42 U.S.C. § 671(a)(15); *cf.* CAL. WELF. & INST. CODE § 361.5 (West Supp. 2004).

³⁰⁰ Roberts, *supra* note 271, at 116-17. *See generally* Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189 (1999). This Article is not intended to engage in the continuing debate over child welfare philosophy and whether state law should emphasize children's reunification with their biological parents over adoption of these children by new families. Nor is it suggesting when a child should be

California Legislature intended that at least one purpose—if not the primary purpose—of the child welfare statutes was to prevent abuse. *Terrell R.* erred when it broadly held otherwise.

In sum, the child welfare statutes were intended to assure the safety of children.³⁰¹ When a child is physically or sexually abused, due to the government's negligent failure to take legislatively mandated actions, a cause of action for direct liability should lie. This is precisely the type of claim that Government Code section 815.6 intended to allow.

3. *Discretionary act immunity rarely applies to foster care placement and supervision.*

Not only did the *Terrell R.* court incorrectly analyze whether there was direct liability, the court also erred in its derivative liability analysis. The court concluded that “a social worker is immune from liability for negligent supervision of a foster child unless the social worker fails to provide specific services mandated by statute or regulation.”³⁰² Building on *Becerra's* faulty analysis, the court explained that discretionary act immunity under Government Code section 820.2 applied, because foster care supervision is “an activity loaded with subjective determinations, and fraught with major possibilities of an erroneous decision.”³⁰³ In so ruling, the court applied the literal definition of “discretionary” that has been repeatedly rejected by the California Supreme Court,³⁰⁴ confused derivative and direct liability, and ignored the rules of stare decisis.

The court of appeal first erred in its discretionary immunity analysis when it found that a social worker is immune for all acts not mandated by statute.³⁰⁵ No such immunity exists. As described above,³⁰⁶ immunity attaches only to “basic policy decisions”—those decisions that involve planning rather than operational or ministerial decisions.³⁰⁷ The California Supreme Court has made

removed from the parental home, or questioning whether the law sufficiently promotes family preservation. But there is universal agreement that children who have been severely physically or sexually abused must be protected. The Article thus makes only the modest point that whether the means to achieving child safety are through family preservation or adoption from foster care, the purpose of the statutes is to protect children from harm.

³⁰¹ In this respect California is not different than other states. See generally Martin, *supra* note 93, at 194-95 (1991) (surveying states' child welfare statutes and noting that all the “statutes have as their purpose the protection of abused children”).

³⁰² *County of Los Angeles v. Superior Court (Terrell R.)*, 125 Cal. Rptr. 2d 637, 649 (Ct. App. 2002), *reh'g denied*, 2002 Cal. App. LEXIS 4872 (Ct. App. Oct. 18, 2002), *rev. denied*, 2002 Cal. LEXIS 8629 (Dec. 18, 2002).

³⁰³ *Id.*

³⁰⁴ See *supra* notes 148-155 and accompanying text.

³⁰⁵ *Terrell R.*, 125 Cal. Rptr. 2d at 648-50.

³⁰⁶ See *supra* note 151 and accompanying text.

³⁰⁷ *Barner v. Leeds*, 13 P.3d 704, 709 (Cal. 2000).

this point repeatedly.³⁰⁸ To determine whether a “basic policy decision” has been made, a court must look to the underlying rationales supporting governmental immunity (i.e. in this case, separation of powers).³⁰⁹ But the *Terrell R.* court neither explained why the alleged supervision constituted a basic policy decision, nor discussed how the rationales underlying governmental immunity required finding that the social worker had made a basic policy decision in neglecting to supervise the foster child.³¹⁰ Instead, the court applied the impermissible literal or semantic definition of “discretionary” to conclude that immunity applied to all nonmandatory obligations.³¹¹ That analysis was misguided.

This analytical error must have been caused by the court’s confusion between derivative liability and direct liability. As explained above in Part II, only direct liability is concerned with whether a mandatory duty is imposed.³¹² Derivative liability is broader, permitting a government entity to be sued for the negligent acts of employees unless the government makes a strong showing that a basic policy decision is involved.³¹³ In *Terrell R.*, the court never explained how the government met this burden. Moreover, it applied the same standard for both the derivative and direct liability issues because it held that social workers are immune from negligent supervision claims “unless the social worker fails to provide specific services mandated by statute or regulation.”³¹⁴ By doing so, the court conflated two distinct bases of liability. If the court’s analysis was correct and discretionary act immunity under section 820.2 applied to all nonmandatory acts, section 820.2 would be rendered a nullity. There would never be an occasion to analyze whether derivative liability exists because the direct liability analysis would be dispositive in all cases: any nonmandatory act would entitle the employee to immunity. But sections 820.2 and 815.6 are not mere repeats of one another, and should not be read to be redundant.³¹⁵ Basic canons of statutory construction reject such a conclusion.

³⁰⁸ *Id.*; see also *Caldwell v. Montoya*, 897 P.2d 1320, 1326 (Cal. 1995); *Nunn v. State*, 677 P.2d 846, 849 (Cal. 1984) (en banc); *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 350 (Cal. 1976); *Johnson v. State*, 447 P.2d 352, 360 (Cal. 1968).

³⁰⁹ See *supra* notes 92-93 and accompanying text.

³¹⁰ *Terrell R.*, 125 Cal. Rptr. 2d at 648-50.

³¹¹ *Id.* at 644-45, 649 (stating that “[t]he appropriate degree of supervision of a foster parent, in excess of the visitation schedule mandated by statute or regulation, is a uniquely discretionary activity” and noting that “discretionary decisions” made in connection with placement decisions should be outside the scope of review).

³¹² See *supra* Part II.C.1-2.

³¹³ *Johnson*, 447 P.2d at 363 (explaining that government has a heavy burden and must make a “strong showing” to overcome the presumption against immunity); see also *supra* Part II.C.2 and note 171.

³¹⁴ *Terrell R.*, 125 Cal. Rptr. 2d at 649.

³¹⁵ *Cal. Pac. Collections, Inc. v. Powers*, 449 P.2d 225, 227 (Cal. 1969) (en banc) (reasoning that a court may not construe a statute to render language “redundant and a nullity, thereby violating one of the most elementary principles of statutory construction”); *Napa Valley Wine Train, Inc. v. Pub. Utils. Comm’n*, 787 P.2d 976, 979 n.11 (Cal. 1990) (“[W]e are not

The *Terrell R.* court not only applied an improper standard to discretionary-act immunity, but also departed from prior precedent that was directly on point. The *Elton* decision was on all fours. *Elton*, just like *Terrell R.*, involved the failure to place a child in a properly certified home and to properly supervise.³¹⁶ But the *Terrell R.* court summarily rejected the *Elton* holding. Rather than discuss *Elton* in detail, in a footnote the court dismissed *Elton* as “not controlling” because: (1) “the appeal in *Elton* followed a demurrer, not a summary judgment;” (2) “*Elton* was decided prior to the adoption of statutes mandating the exercise of discretion by social workers”; and (3) the appellate “court [that decided *Elton*] . . . later severely limited the holding of *Elton* and described the decision as ‘difficult.’”³¹⁷ But each reason given for ignoring *Elton* was specious.

First, no distinction should be made between the demurrer and the summary judgment, because the court’s determination of whether governmental immunity applies involves threshold questions of law.³¹⁸ The *Terrell R.* court recognized this itself.³¹⁹ More specifically, the court did not limit itself to finding that the social worker had fulfilled the mandatory duties prescribed by the statutes and regulations.³²⁰ Rather, the court ruled, as a matter of law, that the statutes and regulations set forth no mandatory duties.³²¹ Second, that certain statutes (notably unidentified by the *Terrell R.* court) may allow social workers to exercise discretion, as explained above, is not relevant in determining whether discretionary act immunity applies, because it does not explain whether a basic policy decision has been made in a particular case.³²² That distinction is therefore no distinction at all. The factual basis for this

willing to assume that the Legislature has enacted a nullity[.]”); see also *Bailey v. United States*, 516 U.S. 137, 146 (1995) (“We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (“In construing a statute we are obliged to give effect, if possible, to every word Congress used.”); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (explaining that an “elementary canon of construction [is] that a statute should be interpreted so as not to render one part inoperative”).

³¹⁶ *Elton v. County of Orange*, 84 Cal. Rptr. 27 (Ct. App. 1970).

³¹⁷ *Terrell R.*, 125 Cal. Rptr. 2d at 649 n.5.

³¹⁸ See, e.g., *Barner v. Leeds*, 13 P.3d 704, 709 (Cal. 2000) (determining discretionary act immunity as a question of law after the trial court granted summary judgment); *Haggis v. City of Los Angeles*, 993 P.2d 983, 987 (Cal. 2000) (“Whether an enactment creates a mandatory duty is a question of law . . . ”); *Nunn v. State*, 677 P.2d 846, 851 (Cal. 1984) (explaining that whether an enactment is intended to impose a mandatory duty is a question of law); see also *Regents of the Univ. of Cal. v. Superior Court*, 976 P.2d 808, 821 (Cal. 1999) (holding that a court must conduct de novo review of a trial court’s resolution of underlying statutory construction issues).

³¹⁹ *Terrell R.*, 125 Cal. Rptr. 2d at 643 (explaining that whether a mandatory duty exists and whether a government is immune from suit raise questions of law).

³²⁰ *Id.* at 648-50.

³²¹ *Id.* at 645-48.

³²² See *supra* Part II.C.2; see also *supra* note 161 (discussing cases finding derivative liability where a government employee was negligent after making basic policy decision).

assertion is also suspect. If anything, recent federal legislation adopted by California provides greater, not less, guidance as to what social workers can or can not do.³²³ Third, the *Terrell R.* court is simply wrong when it suggested that the court of appeal later “severely limited the holding of *Elton*” in foster care abuse cases. On the contrary, the *Elton* court, in *Ronald S. v. County of San Diego*, was explicit that it was not attempting to “disapprov[e] or retreat from” *Elton*.³²⁴ Instead, the *Ronald S.* court recognized that immunity would not attach in the foster care context.³²⁵ *Terrell R.* thus provided no reason why it should depart from established law.

V. A RETURN TO WHAT THE LEGISLATURE INTENDED

As shown above, the *Terrell R.* court erred. That it did so, however, begs a question: how should a court methodically analyze a negligent placement or supervision claim in the future? Synthesizing Parts II and III above, what follows is a framework for how judges should correctly analyze foster care abuse cases, followed by a short explanation for why holding governments liable for negligent foster care placement and supervision is a sound result.

A. *The Resolution of Negligent Placement and Negligent Supervision Claims*

The resolution of negligent placement and supervision claims mirror one another. For both types of claims, as discussed above, a court must address whether the government may be held directly or derivatively liable: two separate and distinct analyses.³²⁶ In deciding whether either liability prong is satisfied, a court must keep in mind that the Legislature intended liability to be the rule, not the exception.³²⁷

1. *Direct governmental liability.*

As explained, a government is directly liable if a social worker fails to consider and assess the mandatory criteria set forth in the placement and supervision statutes, and those failings result in the child’s injuries.³²⁸ In a

³²³ See *supra* notes 292-301 and accompanying text (discussing 1997 federal legislation adopted in California in 1998); see also *supra* notes 60-65 and accompanying text (discussing California’s failure to meet federal and state mandatory foster care requirements).

³²⁴ *Ronald S. v. County of San Diego*, 20 Cal. Rptr. 2d 418, 425 (Ct. App. 1993); see also *supra* notes 198-200 and accompanying text.

³²⁵ See *Ronald S.*, 20 Cal. Rptr. 2d at 425 (explaining that when a child is in the custody of the county, the county’s administration and surveillance of that child is properly characterized as ministerial).

³²⁶ See *supra* Parts II.C & III.A.

³²⁷ See *supra* note 171 and accompanying text.

³²⁸ By way of example only, these mandatory duties during placement would include, but are

negligent placement claim, a government avoids liability if evidence exists that the social worker evaluated and assessed all the statutorily required criteria, and that a rationale existed for choosing a placement based on the criteria considered.³²⁹ This is because under the direct liability standard, a government is not liable merely because the court disagrees with the selection ultimately made, so long as the criteria and priorities of the statutes and regulations are adhered to.³³⁰ If, however, any of the required criteria were not considered or the required duties were not met, the government is *per se* negligent.³³¹ Evidence that a social worker placed a child in a particular foster care home because of convenience, or cost, or for expediency—reasons not set forth in the statutes as being permissible placement criteria—should expose the government to liability. This is because the specific placement criteria which a social worker must consider before placing any foster child are mandatory,³³² and requirements such as considering whether the foster placement is a safe setting are specifically intended to protect the foster child from abuse.³³³

The same principles apply to a negligent supervision claim. Under a negligent supervision theory, a government would be liable if, among other things, a social worker failed to take reasonable efforts to monthly visit the children to which they are assigned,³³⁴ maintain and regularly update a case

not limited to: (1) taking reasonable efforts to prevent out-of-home placements, CAL. WELF. & INST. CODE § 16501.1(b)(1) (West Supp. 2004); (2) basing the choice of an out-of-home placement on the selection of a “safe setting that is the least restrictive or most family-like,” *id.* § 16501.1(c); (3) considering, in the order prioritized by the statute, where to place the child (such as with relatives), *id.*; (4) taking diligent efforts to place siblings together in the same home, or to explain why the siblings were not placed together, *id.* § 16002(b); (5) explicitly setting forth in the case plan why the placement is in the best interests of the child, if the child is placed a “substantial distance from the home of the child’s parent,” *id.* § 16501.1(f)(7); and (6) considering the other placement criteria and priorities set forth by the statutes and regulations, *id.* § 361.3; DSS MANUAL, *supra* note 244, regs. 31-420.1, 31-420.2.

³²⁹ *Becerra v. County of Santa Cruz*, 81 Cal. Rptr. 2d 165, 170 (Cal. Ct. App. 1998) (holding that “the mandatory duty imposed by [Welfare and Institutions Code] section 16501.1 was the County’s assessment of statutory factors as part of its placement decision” and finding no direct liability when “social workers made a placement assessment consistent with their statutory mandate, evaluating the required criteria . . .”); *cf.* *Haggis v. City of Los Angeles*, 993 P.2d 983, 989-90 (Cal. 2000) (explaining in a real property development case that under municipal codes, the city has a mandatory duty to make certain inspections and determinations about the condition of the property and, if the condition is determined to be unstable, to record a certificate of substandard condition); *Braman v. State of California*, 33 Cal. Rptr. 2d 608, 612-13 (Ct. App. 1994) (finding that statute imposed a mandatory duty to consider and investigate prior to selling firearm to prospective firearm purchaser).

³³⁰ See *supra* Part II.C.

³³¹ See *supra* notes 124-132 and accompanying text; see also *Becerra*, 81 Cal. Rptr. 2d at 170.

³³² See *supra* note 328.

³³³ See, e.g., CAL. WELF. & INST. CODE § 16501.15 (defining a “safe” home as one free from abuse or neglect).

³³⁴ *Id.* § 16516.5(a) (requiring that foster children placed in group homes “shall be visited at least monthly by a county social worker or probation officer” and that “[e]ach visit shall include a private discussion between the foster child and the county social worker”); DSS

plan for the foster child,³³⁵ hold a timely permanency hearing,³³⁶ or provide family reunification services.³³⁷ Direct liability exists in such circumstances, so long as causal injury can be shown, because: (1) the foster care statutes and regulations use obligatory language,³³⁸ and (2) the purpose of requiring visits, case plans, permanency hearings, and family reunification is to protect foster children from harm.³³⁹

2. *Derivative governmental liability.*

Once a court has resolved the direct liability issue, a court must also address the derivative liability question. A government can be held derivatively liable, if a social worker negligently places or supervises a child in a foster care home, regardless of whether the mandatory duties are complied with.³⁴⁰ Although the decision to place a child in foster care is a basic policy decision to which prosecutorial immunity attaches,³⁴¹ the exercise of that discretion and the placement and supervision of a child in a particular foster home must be done with due care.³⁴² A government is not immune simply because a social worker has discretion to make choices.³⁴³ Immunity attaches only if the social worker makes a basic policy decision.³⁴⁴

MANUAL, *supra* note 244, regs. 31-320.2, 31-320.41 (“[T]he social worker shall visit the child at least three times in the first thirty calendar days, including the initial in-person response.”); *see also* Scott v. County of Los Angeles, 32 Cal. Rptr. 2d 643, 652-53 (Ct. App. 1994) (indicating that a mandatory duty exists to regularly visit).

³³⁵ CAL. WELF. & INST. CODE § 16501.1(d)-(f) (setting forth case plan requirements).

³³⁶ *Id.* § 361.5; CAL. R. CT. 1461(a).

³³⁷ CAL. WELF. & INST. CODE § 16000 (requiring that “[f]amily reunification services shall be provided for expeditious reunification of the child with his or her family, as required by law”).

³³⁸ *See supra* notes 140-142 and accompanying text.

³³⁹ *See supra* Part III.C.2; *see generally* CAL. WELF. & INST. CODE § 16000.1 (noting that the state has a duty to “care for and protect the children that the state places into foster care”).

³⁴⁰ *See supra* notes 120-123 and accompanying text; *see also* Part II.C.2.

³⁴¹ Alicia T. v. County of Los Angeles, 271 Cal. Rptr. 513, 519-20 (Ct. App. 1990); Jenkins v. County of Orange, 260 Cal. Rptr. 645, 647-48 (Ct. App. 1989).

³⁴² *See* Elton v. County of Orange, 84 Cal. Rptr. 27, 29-32 (Ct. App. 1970); *supra* Part III.A; *see also supra* note 195 (listing cases throughout country that hold that states are answerable for injuries suffered by foster children as a result of negligence in foster care placement or supervision).

³⁴³ *See supra* text accompanying notes 148-170 (explaining how the California Legislature and the California Supreme Court have consistently rejected granting governmental employees immunity simply because they exercise discretion or make choices). *See generally* CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, *supra* note 150, § 10.16 (explaining how the California Supreme Court has rejected a semantic approach to discretion because “taken literally, the term ‘discretionary’ lends itself to such a wide range of applications that it could conceivably nullify almost all vicarious liability of public entities under the Tort Claims Act for employee torts—a result clearly inconsistent with legislative intent”).

³⁴⁴ *See supra* Parts II.C.2. *See generally* CALIFORNIA GOVERNMENT TORT LIABILITY

To some extent, whether immunity applies will depend on the nature of plaintiff's claim. A county is entitled to immunity, for example, if the plaintiff argues that the child should never have been placed in foster care, or that the social worker should have considered other criteria not set forth by the statutes. That abused children should be placed in foster care rather than kept with their families, or that certain criteria instead of others should be considered, are high-level decisions made by the legislature. If, however, a social worker ignored warning signs that should have placed a reasonable social worker on notice that the foster parents posed a danger to the child, then immunity can not be conferred.³⁴⁵ A social worker has no discretion, either in placement or supervision, to ignore warning signs that a child is in danger. Stated differently, the child welfare statutes impose a general duty for social workers to protect foster children in their control against intentional foster parent abuse.³⁴⁶

In short, the decision to place a child with, or supervise a child in, a

PRACTICE, *supra* note 150, § 10.10-12 (describing long line of California Supreme Court authority finding that immunity only attaches to "basic policy" decisions).

³⁴⁵ *Jordy v. County of Humboldt*, 14 Cal. Rptr. 2d 553, 559-60 (Ct. App. 1992) (agreeing with other cases holding that a "public entity has a duty to prevent physical abuse of children in the custody of the state where it has notice of the abuse").

³⁴⁶ *See, e.g., id.* at 559-60 (discussing general duty to protect children from intentional physical abuse); *see also* *Vonner v. State Dep't of Pub. Welfare*, 273 So. 2d 252, 253 (La. 1973) (holding that the state has a duty to protect against intentional physical abuse causing serious injury); *Braam ex rel. Braam v. State*, 81 P.3d 851, 856 (Wash. 2003) (finding that a foster child has a substantive due process right to be free from abuse). This general duty on behalf of the state to protect foster children within the state's custody from intentional abuse is recognized throughout the country, often as a constitutional right. *See, e.g., Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (recognizing a clearly established constitutional right to reasonably safe foster care in light of other circuit court precedents); *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992) (explaining that "children in the custody of a state had a constitutional right to be reasonably safe from harm"); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 851-53 (7th Cir. 1990) (finding a constitutional right not to be placed with a foster parent who caseworkers know or suspect is likely to abuse or neglect a foster child); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990) ("[D]ue process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes."); *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990) (en banc) (finding a duty to provide adequate care when the state creates a special relationship with children by removing them from their natural home and placing them under state supervision); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (en banc) ("[A] child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a child confined in a mental health facility that the foster child may bring a section 1983 action for violation of fourteenth amendment rights."); *Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134, 141 (2d Cir. 1981) (holding that a child in state custody has a constitutional right not to be placed in a foster care setting known to be unsafe); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 992-93 (D.D.C. 1991) (finding a constitutional liberty interest, to the extent that services are essential, to prevent harm to children in the district's custody), *aff'd and remanded on other grounds sub nom. LaShawn A. v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993); *see also* *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 507 (D.N.J. 2000) (recognizing substantive due process rights); *Jordan v. City of Philadelphia*, 66 F. Supp. 2d 638, 646 (E.D. Pa. 1999) (collecting cases recognizing substantive due process rights of foster children).

particular foster parent home—although involving discretionary choices—is not a basic policy decision entitled to immunity. This is because social workers may not make policy decisions to place children in danger, to not supervise, or to ignore signs that the foster parents are abusive. A social worker when deciding a particular placement (within the confines of the statutory criteria), or when supervising that placement (again within the confines of the statutory requirements) is not rendering a high-level decision, formulated after debate and input from different levels of county government, with concern over the future ramifications of that policy. Rather, a social worker is merely exercising his or her own judgment: what the California Supreme Court has rightly described as “a classic case for the imposition of tort liability.”³⁴⁷

B. *A Few Final Observations*

This article has attempted to demonstrate why the recent trend to ostensibly grant the government absolute immunity in foster care abuse cases is unprincipled and inconsistent with the Legislature’s intent.³⁴⁸ Before the Article concludes, however, some brief observations as to why limited immunity is the correct result seems appropriate.

First and most importantly, rarely granting governmental immunity in foster care abuse cases is the right result because that is what the law requires. The California Legislature decided long ago to abolish absolute governmental immunity.³⁴⁹ A court of appeal is simply not an appropriate forum to rethink what the legislature has done. If the Legislature wishes to limit government claims in foster care abuse cases, then it must say so explicitly. Of course, the Legislature has never done so and, on the contrary, has sought to protect children more not less.³⁵⁰

Second, although always an important consideration for deciding when liability should attach,³⁵¹ deterrence takes on singular importance in cases involving the protection of children. In the foster care context, the government is asserting itself to become the custodian of a child.³⁵² If a government is going to interfere with families, and parents’ rights to raise their own children as they see fit,³⁵³ the government better have a good reason to do so and better

³⁴⁷ *Johnson v. State*, 447 P.2d 352, 363 (Cal. 1968).

³⁴⁸ That the California Legislature enacted legislation specifically to address *Terrell R.*—a remarkable and unusual response to a court of appeal decision—is itself strong evidence that the courts have gone astray in resolving foster care abuse cases. See CAL. WELF. & INST. CODE § 16000.1 (West Supp. 2004).

³⁴⁹ See *supra* Part II.A.

³⁵⁰ See *supra* notes 66-71, 286-300 and accompanying text.

³⁵¹ See *supra* notes 108-110 and accompanying text.

³⁵² See *supra* Part I.A.

³⁵³ See *supra* note 25 and accompanying text; see also *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (explaining that “the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state

do a good job to protect those children.³⁵⁴ Indeed, the entire purpose of the foster care system is undermined if children are removed from their homes to protect them, but then are negligently exposed to even more dangerous conditions.³⁵⁵ The strongest incentives – including the risk of civil liability – are therefore needed to ensure that children are protected and that government workers use extraordinary care to fulfill that goal. This is particularly true given the recent revelations about California's foster care system and the apparent perverse financial incentives that may exist for the state to improperly remove children from their families.³⁵⁶

Third, granting governments immunity when children are abused because of a social worker's negligence, leads to a strange result. Foster children who are injured because of their foster parents' negligent acts are entitled to recover from the government.³⁵⁷ They can do so through the foster care fund.³⁵⁸ That fund, however, disallows any recovery when a child is injured because of a foster parent's intentional torts.³⁵⁹ A bizarre system, not intended by the Legislature, is thus created if children negligently injured are permitted to recover from the government, but children who are intentionally abused may not. In fact, in negligence cases, as compared to foster parent intentional abuse cases, the need to recover from the government is less acute because the foster child has other ways of seeking recovery: such as from the foster parent's

can neither supply nor hinder").

³⁵⁴ See generally Kindred, *supra* note 40, at 455-56 (discussing the competing interests of protecting children and respecting family integrity, and arguing that because of the potential "harm posed to children by family intervention," the "state should not intervene without good reason"). For a discussion of how poverty has been mistaken for child neglect, and the disparate impact that child protection services have on racial or ethnic minorities, see Candra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1023 (2003).

³⁵⁵ See *supra* Part I.A (explaining that temporary child protection is the primary purpose of foster care); see also Kindred, *supra* note 40, at 459 (noting that "[t]here is substantial support for the proposition that, except in cases involving seriously harmed or abandoned children, a child's situation is not improved through removal" and that "removal frequently results in placing a child in a more detrimental situation, thus compounding the harm").

³⁵⁶ See Troy Anderson, *Foster Cash Lure May Fade*, L.A. DAILY NEWS, Feb. 17, 2004, at N3 (describing financial incentives to place children in foster care); Troy Anderson, *Foster System Probe Sought by Legislators*, L.A. DAILY NEWS, March 6, 2004, at N4 (noting *Daily News* investigation which "uncovered estimates that as many as half of the 75,000 children in [Los Angeles] county foster care and adoptive homes were needlessly placed in a system often more dangerous than the homes from which they were removed," and explaining that "[f]or each child placed in the system, counties receive \$30,000 to \$150,000 a year"); Troy Anderson, *Supervisors Tackle Foster Care*, L.A. DAILY NEWS, Feb. 18, 2004, at N3 (noting Los Angeles County supervisors's decision to negotiate with the state and federal governments to eliminate financial incentives for putting children in foster care).

³⁵⁷ CAL. HEALTH & SAFETY CODE § 1527.1 (West 2000) (establishing Foster Family Home and Small Family Home Insurance Fund).

³⁵⁸ See *id.*; see also Hill v. Newkirk, 31 Cal. Rptr. 2d 859, 864-65 (Ct. App. 1994) (discussing claims for which the fund is liable).

³⁵⁹ CAL. HEALTH & SAFETY CODE § 1527.3(a) (excluding intentional acts from coverage).

insurance carrier.

CONCLUSION

The California Tort Claims Act has, until recently, long served as an important means by which foster children may obtain recourse from the government for injuries suffered as a result of a social worker's negligence. In the 1990s, the California courts of appeal retreated—without justification—from the dictates of the Tort Claims Act and the uniform decisions of the California Supreme Court. A low point was reached in late 2002 when, in *Los Angeles County v. Superior Court (Terrell R.)*, the court of appeal confused the issues of direct and derivative liability to effectively grant social workers absolute immunity. That case ignored over three decades of law, the purposes behind the Tort Claims Act, and basic canons of statutory construction to reach a result that contradicts the California Legislature's unambiguous intent.

The Legislature was wise to limit the impact of *Terrell R.* Contrary to that case's holding, the child welfare statutes that use obligatory language impose mandatory duties on social workers. Moreover, the government is not immune when a social worker negligently supervises or places a foster child merely because the social worker exercises "discretion." Decisions made with respect to the maintenance, care, or supervision of a foster child are not basic policy decisions entitled to immunity. As the California Supreme Court has held repeatedly, governmental liability is the rule, not the exception. That governments should be exposed to liability when social workers negligently place or supervise foster care children is not only the law, but also supported by strong public policy. Accordingly, in the future, the courts must be careful to avoid the mistakes of *Terrell R.*